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IN THE

Supreme Court of the United States

October Term 1974

NO.

THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA (SUCCESSOR IN INTEREST TO THE DEPARTMENT OF PUBLIC HEALTH OF THE STATE OF GEORGIA), et al.,

Petitioners,

- v -

A. J. BURNHAM, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, the Department of Human Resouces of the State of Georgia and Board of Human Resources of the State of Georgia (successors in interest to the no longer extant Department of Public Health and Board of Health of the State of Georgia)[1]; Richard M. Harden, Commis-

[1] Pursuant to governmental reorganization under Georgia's "Executive Reorganization Act of 1972," Ga. Laws 1972, pp. 1015-1068 (Ga. Code Ann. §§ 40-3501 to 40-35221), the Department and Board of Human Resources are now exercising the powers and functions of the former Department of Public Health and Board of Health of the State of Georgia. See, e.g. Ga. Laws 1972, pp. 1015,

missioner, Department of Human Resources (successor in interest to Dr. John H. Venable, Director, Department of Public Health); T. M. Jim Parham, Deputy Commissioner, Department of Human Resources (successor in interest to Dr. Elton Osborne, Deputy Director, Department of Public Health); Dr. W. Douglas Skelton, Director, Division of Mental Health, Department of Human Resources (successor in interest to Dr. Addison Duval, Director, Division of Mental Health, Department of Public Health); Mr. Jack H. Watson, Jr., Chairman, Dr. Joseph Turner and Dr. Donald Pittard, members of the Board of Human Resources, and all other members of the Board of Human Resources, jointly and severally, who are similarly situated (successors in interest to Dr. Lamar Peacock, Dr. M. Freeman Simmons, Dr. Beverly W. Forester, and the other similarly situated members of the no longer extant Board of Health of the State of Georgia); Dr. John Gates, Superintendent, Central Georgia Regional Hospital at Central State Hospital (successor in office to Dr. James Craig); Dr. Eugene C. Jarrett, Director, Southwestern State Hospital (successor in office to Dr. Norman B. Pettit); Dr. Lawson H. Bowling, Director, Georgia Regional Hospital at Atlanta; Dr. James Craig, Director, Georgia Regional Hospital at Savannah (successor in office to Dr. Ilhan Ermutlu); Dr. Everett C. Kuglar, Director, Georgia Regional Hospital at Augusta; Dr. Norman D. Pursley, Director Gracewood State Hospital; Honorable Eugene Gunby, Judge, Court of Ordinary of Fulton County, Georgia, and Honorable Marion Guess,

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1070-1072 (Ga. Code Ann. §§ 40-35123.1 to 40-35123.3). Pursuant to Rule 48(3) of this Court we have similarly substituted the names of certain successors in office for the originally named office-holder defendants. The original complaint expressly lists "all . . . successors in each office" as defendants.

Jr., Judge, Court of Ordinary of DeKalb County, Georgia (successor in office to the Honorable Katherine Mann); and all other judges of the courts of ordinary of Georgia, jointly and severally who are similarly situated; respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 8, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported as *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335 (N.D. Ga. 1972). The *per curiam* opinion of the Court of Appeals for the Fifth Circuit reversing the district court's decision, rendered on November 8, 1974, is not yet reported. Both opinions are set forth in the appendix hereto, as is the unreported decision of the Court of Appeals in the companion case of *Wyatt v. Aderholt*, __F.2d__ (5th Cir. No. 72-2634, decided November 8, 1974).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 8, 1974, and this petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

On October 21, 1974, this Honorable Court granted certiorari to review a decision of the Court of Appeals for the Fifth Circuit on the question of whether there is a

constitutional right to treatment for persons involuntarily committed to state mental institutions. *See Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *cert. granted*, __U.S.__, 42 L.Ed.2d 138 (October 21, 1974). The present case presents a logical progression from this threshold issue of *Donaldson*. Here the controversy is not one of "treatment" versus "no treatment", but of whether where therapeutic or curative treatment beyond custodial care concededly is being given, it must also be given according to some *constitutionally prescribed dosage*. As the district court put it: "Plaintiffs [here the Respondents] do not assert that 'treatment' is not being provided in the Georgia mental health facilities, but that the 'adequacy' (*i.e.* quality, quantity, individualization, and level) of treatment is deficient and that 'adequate treatment' is mandated by the constitution of the United States." *See Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1339, n. 7 (N.D. Ga. 1972). To Petitioners (Defendants below), the district court's dismissal of the action was anticipated, the Court of Appeals' reversal was not. The precise issues presented to this Court for review are:

1. Whether persons committed to state mental institutions have not only *a federal constitutional right* to therapeutic or curative psychiatric treatment, but also have *a federal constitutional right* to some particular level, degree or measure (quantitatively and qualitatively) of such treatment.

2. Whether it is consistent with the Eleventh Amendment for a federal district court to entertain a suit by private individuals which would require a state to reorder its priorities and increase its level of fiscal support

for the therapeutic or curative psychiatric treatment it provides in its mental institutions.

3. Whether Respondents claim of a right to some unspecified dosage of therapeutic or curative psychiatric treatment for a class consisting broadly of all mentally disabled persons in a state's mental institutions presents a justiciable controversy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amend XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U. S. Constitution, Amend XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Ga. Code Ann. § 88-502.3. *"Quality of care and treatment—*

(a) Each patient in a facility and each person receiving services for mental disorders shall receive care and treatment that is suited to his needs and such care and treatment shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. In order to assure proper care and treatment, the superintendent of a facility shall require that each patient receive such medical attention as his condition demands and that, unless the patient or his representatives consent in writing, no treatment shall be given which is not recognized as standard psychiatric treatment.

(b) If a patient hospitalized under the provisions of

this Chapter is able to secure the services of a private physician, he shall be allowed to see his physician at any reasonable time. The superintendent is hereby authorized and directed to establish regulations designed to facilitate examination and treatment which a patient may request from such private physician.

(c) Every patient admitted to a facility under the provisions of this Chapter shall be examined by the staff of the admitting facility as soon as possible after his admission."

Ga. Code Ann. § 88-502.11. *"Judicial supervision—*

(a) At any time and without notice, a person detained by a facility or a relative or friend on behalf of such person may petition, as provided by law, for a writ of habeas corpus to question the cause and legality of detention and to request the court on its own initiative to issue a writ for release.

(b) A patient or his representatives may file a petition in the court of ordinary in the county where the patient is hospitalized, alleging that the patient is being unjustly denied a right or privilege granted by this Chapter or that a procedure authorized by this Chapter is being abused. Upon the filing of such a petition, the court shall have the authority to conduct a judicial inquiry and to issue any appropriate order to correct any abuse of the provisions of this Chapter."

Ga. Code Ann. § 88-506.1. *"Criteria for non-objecting or involuntary hospitalization—*

A person being within the State may be hospitalized under sections 88-506.2 through 88-506.7 if he is mentally ill and is (a) likely to injure himself or others if not hospitalized or (b) incapable of caring for his physical health and safety."

Ga. Code Ann. § 88-507.1. *"Criteria for judicial hospitalization—*

A person may be hospitalized under sections 88-507.2 and 88-507.3 if he is mentally ill, and he is (a) likely to injure himself or others if not hospitalized or (b) incapable of caring for his physical health and safety."

STATEMENT OF THE CASE

The State of Georgia is not an ogre. It desires the best possible care and treatment for persons confined to its mental institutions. It is the State's declared policy that "no person shall be denied care and treatment for mental disorder," and that an individual's right to the same shall not be delayed because of his inability to pay. See Ga. Code Ann. § 88-502.2. Nor is Georgia's commitment to the proposition one which ends with its simple recognition as a moral obligation. It is a legal "right" which is expansively guaranteed by State law. As the district court aptly noted, Georgia, in 1969, enacted detailed legislation which ". . . has been heralded as one of the most advanced statutory treatments of the subject of hospitalization of the mentally ill in this nation. See Ga. Laws 1969, pp. 505-545; Ga. Code Chapt. 88-5." *See Burnham v. The Department of Public Health of the State of Georgia,* 349 F.Supp. 1335, 1337 (N.D. Ga. 1972). With an abundance of "due process" protections,[2] the Act provides for both voluntary and involuntary hospitalization of persons suffering from mental illness. Indeed that portion of the 1969

[2]Notice of the right to hearing with aid of counsel (court appointed if the patient cannot afford to retain counsel) is required not merely once, but at multiple stages of the commitment procedure, *e.g.,* Ga. Code Ann. §§ 88-504.6, 88-505.3, 88-506.3, 88-506.6, not to mention a continuing right, exercisable at any time and without notice, to seek release through application for a writ of

Act which is popularly referred to as the "bill of rights for the mentally ill" goes far beyond those basic rights asserted by Respondents (plaintiffs below).[3] To illustrate, in paragraph 2 of their complaint, Respondents mention the necessity of providing: (1) "a humane psychological environment", (2) "a qualified staff in numbers sufficient to administer adequate treatment", and (3) "individualized treatment plans for each patient." [A. 7][4] But what do the Respondents say here that Georgia law doesn't already require in even greater abundance? Ga. Code Ann. § 88-502.3(a), for example, provides that:

> "(a) Each patient in a facility and each person receiving services for mental disorders shall receive care and treatment that is suited to his needs and such care and treatment shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. In order to assure proper care and treatment, the superintendent of a facility shall require that each patient receive such medical attention as his condition demands and that, unless the patient or his representatives consent in writing, no treatment shall be given which is not recognized as standard psychiatric treatment."

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habeas corpus. Ga. Code Ann. § 88-502.11. See also, Ga. Code Ann. § 88-502.12. The complaint filed in this case did not suggest any "due process" defects in connection with Georgia's commitment procedures.

[3]See Ga. Laws 1969, pp. 505, 508, *et seq.* (Ga. Code Ann. §§ 88-502.1 *et seq.*). In addition to the general protection of all civil, political, personal and property rights, Ga. Code Ann. § 88-502.1, protection is extended to communications (Ga. Code Ann. § 88-502.5), voting rights (Ga. Code Ann. § 88-502.7), the right to legal counsel (Ga. Code Ann. § 88-502.12), and the patient's attorney's access to the physicians who have attended him (Ga. Code Ann. § 88-502.17).

[4]Designations as [A. 7] refer to the Appendix as printed for the Court of Appeals for the Fifth Circuit.

The rights of the mentally disabled in Georgia are readily enforceable through State judicial remedies also provided by the Act. See, e.g. Ga. Code Ann. §§ 88-502.11 and 88-502.16.

The district court also took note of the fact that Georgia's commitment to progress in the area of care for the mentally disabled is further reflected in the difficult but essential area of fiscal support, with an increase in the General Assembly's appropriations from $13,000,000.00 in 1960 to the $90,000,000.00 level in 1972. *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1337 (N.D. Ga. 1972).[5] The level of effort which the State makes in the area of public health generally (including although not limited to mental health) can be seen in the Research Report 1972-R1 of the Research Division of the National Education Association, entitled "Rankings of the States, 1972", pp. 34 (table 55) and 56 (table 97). The Report shows that while a relatively poor State in terms of per capita income, ranking 34th in the Nation in this respect during 1970, it stood 4th in the Nation in per capita expenditures for public health and hospitals.

This is not to say that there is not considerable room for improvement, or that no problems, faults or factual deficiencies exist. The nationwide shortage of medical professionals, particularly acute, for example, with respect to Registered Nurses, obviously affects public as well as private hospitals in Georgia just as it does elsewhere. Then too, since there has at times been an actual waiting list of individuals seeking *voluntary* admission to the State's

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[5]Although not a part of the record it is of interest to note that State funding for the care and treatment of the mentally disabled has now reached the $160,000,000.00 level.

mental institutions, it is not surprising to find that some overcrowding has resulted precisely because of the State's commitment to the right of the mentally disabled to diagnosis, care and individualized treatment. In attempting to meet these problems, the State has, among other things, undertaken to construct a number of regional hospitals as well as to develop community mental health programs. Thus the number of patients at the state's most overcrowded hospital, Central State Hospital at Milledgeville, Georgia, had been reduced from a peak of about 12,000 to around 7,400 at the time the present suit was filed.[6]

Rather than applauding this background of effort as did the district court,[7] the Atlanta chapter of the American Civil Liberties Union, in sponsoring this suit, apparently took the view that since a United States District Court in Alabama had been persuaded to discover or create *a federal constitutional* right to therapeutic psychiatric treatment in that State, *see Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards*, 334 F.Supp. 1341 (1971), *enforced*, 344 F.Supp. 373 (1972), it should hasten to achieve the same result in Georgia. Totally ignored were the substantial factual disparities between the two states in connection with the care and treatment of the mentally disabled, many of which were matters of public record.[8]

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[6]The Division of Mental Health of the Department of Human Resources advises that the present number of mentally disabled patients at Central State Hospital is 5,354.

[7]*See Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1337-38 (N.D. Ga. 1972).

[8]Prior to the Court of Appeals' decision even a "case comment" favorable to *Wyatt* and critical of *Burnham* conceded that there were grounds upon which the differing district court decisions could both be affirmed upon appeal. *See* 86 Harv. L.Rev. 1282,

In filing their action on March 29, 1972, Respondents invoked the district court's jurisdiction under the "civil rights" statutes, 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. 1343(3) and (4), to redress claimed deprivations under color of State law, of rights, privileges and immunities said to be secured by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States [A. 4-5]. Respondents prayed for both injunctive relief and for a declaratory judgment under 28 U.S.C. § 2201. As the district court noted, the suit, brought as a "class action", was predicated upon the contention that the United States' Constitution not only secures a right to persons confined to State mental institutions to receive psychiatric treatment, but further guarantees that the treatment shall be *"constitutionally* adequate and effective treatment", or, as otherwise stated in the complaint *"constitutionally* adequate diagnosis, care, and treatment of patients." [A. 7-9]; *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1337 (N.D. Ga. 1972) [emphasis by the district court].

In response, Petitioners (the Defendants below) filed defensive pleadings which, in addition to generally denying the factual allegations of the complaint and setting forth certain affirmative defenses, contained several motions to dismiss. These motions were based upon lack of

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1284, n. 11 (1973). In *Wyatt*, for example, there was evidence of severe *physical* health and safety deficiencies, including malnutrition, insect infestation and generally unsanitary conditions. *See Wyatt v. Aderholt*, __F.2d__ (5th Cir., No. 72-2634, decided Nov. 8, 1974). In *Burnham*, Respondents have not claimed the existence of any such physical deprivations or inadequacies in Georgia's institutions. To the contrary, the allegation in their complaint that in some cases "the care and treatment is deficient to the extent that it amounts only to custodial care" [A. 7], coupled with the complete absence of any attack upon the quality of the custodial care as such, seems to us to be at least an implied con-

jurisdiction (i.e. the absence of a "substantial" federal question), the Eleventh Amendment, the failure of the complaint to present a "justiciable issue", and its general failure to state a claim upon which relief could be granted [A. 10-11]. Petitioners additionally moved the court to dismiss the complaint as a "class" action.

Upon consideration of the pleadings, the extensive briefs submitted by the parties, and certain of the factual considerations already referred to (which being matters of public record were susceptible of judicial notice), the district court entered its order dismissing the complaint on August 4, 1972. *See Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335 (N.D. Ga. 1972). Respondents appealed to the United States Court of Appeals for the Fifth Circuit and the case was argued before that court on December 6, 1972, immediately following argument of related issues in the appeal taken by the Alabama defendants in *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ga. 1971), *on submission of proposed standards*, 334 F.Supp. 1341 (1971), *enforced*, 344 F.Supp. 373 (1972).

Almost two years later, after having held for the first time in yet another case of this same genre that persons involuntarily committed to state mental hospitals *do* have a *federal constitutional* right to therapeutic or curative psychiatric treatment (*i.e.* "a constitutional right to such treatment as will help him to be cured or to improve his mental condition"), *see Donaldson v. O'Connor*, 493 F.2d 507, 527 (5th Cir. 1974), *cert. granted*, ___U.S.___, 42, L.Ed.2d 138 (October 21, 1974), the Court of Ap-

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cession that the level of custodial care is not in itself deficient. Certainly no claim to the contrary was presented to the district court.

peals entered its decisions in both *Wyatt* and *Burnham*. In *Wyatt* that court reaffirmed the existence of the *constitutional* right to treatment it had adopted in *Donaldson*. *See Wyatt v. Aderholt*, __F.2d__ (5th Cir., No. 72-2634, decided Nov. 8, 1974). In *Burnham* it simply entered a two sentence *per curiam* order reversing the decision of the district court on the authority of its decisions in *Donaldson* and *Wyatt*, and remanded the case for further proceedings consistent with the principles it had announced in those decisions. *Burnham v. The Department of Public Health of the State of Georgia*, __F.2d__ (5th Cir., No. 72-3110, decided Nov. 8, 1974). It did this notwithstanding the differing factual situation involved in *Burnham* to which we have already referred, and notwithstanding the presence of the additional and we think important legal consideration arising from the fact that the claimed "rights" in *Burnham* go beyond the basic threshold issue of a federally guaranteed right to *some* therapeutic or curative psychiatric treatment beyond custodial care, and seek to *constitutionally* prescribe some unknown (and we would indeed say unknowable as well) "dosage" of such treatment. For reasons we shall go into, we believe that this imposition upon the States of a new *constitutional* obligation to not only render psychiatric treatment, but to render that precise level or amount which a given federal judge may be induced to believe is sufficient or adequate, is worthy of this Court's review.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE CONSTITUTION REQUIRES STATES TO PROVIDE THERAPEUTIC PSYCHIATRIC TREATMENT FOR PERSONS COMMITTED TO THEIR MENTAL INSTITUTIONS, AND IF SO, WHETHER THE CONSTITUTION PRESCRIBES A PARTICULAR DOSAGE OF TREATMENT

Traditionally, decisions as to (1) what governmental services and benefits a State should provide, and (2) the ordering of priorities and fiscal support levels for those which are provided, are left to the several States. *Cf. Fullington v. Shea,* 320 F.Supp. 500, 506 (D. Colo. 1970) [three-judge district court], *aff'd,* 404 U.S. 963 (1971); *Dandridge v. Williams,* 397 U.S. 471, 485-487 (1970); *McGowan v. Maryland,* 366 U.S. 420, 426 (1961). Such decisions are indeed what State government is all about, involving as they do the clash of divergent political ideologies and philosophies on the subject of how the invariably inadequate state tax funds should be allocated and spent. If Respondents are correct in this case, if they are entitled to have federal courts inquire into, second guess and supervise the measure, level and degree of curative psychiatric treatment which the State provides for the mentally disabled in State mental institutions, one may well wonder how or why the situation could be any different with respect to the quality and quantity of the curricula and instructional services provided for children attending schools under the State's compulsory atten-

dance laws, or, for that matter, with respect to the rehabilitative services provided for persons incarcerated in state prisons? Since we are all confined to our social environment, it would also have to be asked why suits based upon alleged "constitutional inadequacies" in the quantity or quality of police protection, public welfare, or sanitation should be any different.

The important policy question in this case, in other words, is whether there is to be *a new federal constitutional right* (whether ascribed to "creation", "discovery", "recognition" or otherwise) which would not only require a state to make a particular public program, benefit or service available to a particular class of persons, but which would require the program, benefit or service to be provided at that particular level (and with that particular degree of state fiscal support) thought to be sufficient or adequate by someone other than the people who foot the bill and their elected representatives. Again we reach the ultimate question of political life—who decides? In the case at bar the question must be asked and answered at two levels. First of all there is the threshold question of whether there is a *federal constitutionally guaranteed* right to psychiatric treatment for mentally disabled persons confined to State mental institutions. Secondly, assuming an affirmative answer to this initial question, does the constitution further prescribe any particular dosage of curative treatment which the State is obliged to provide.

1. *A federally guaranteed right to psychiatric treatment?*

In urging the district court to recognize a constitutionally guaranteed "right to treatment" for persons confined to state mental institutions, Respondents conceded that their position was "somewhat in the forefront of the law." *See Burnham v. The Department of Public Health of the*

State of Georgia, 349 F.Supp. 1335, 1338 (N.D. Ga. 1974). Respondents concession, with which the district court agreed, was well-founded. As recently as 1969, Dr. Morton Birnbaum, who for at least fifteen years has been one of the leading exponents of the creation of a constitutional right to adequate psychiatric treatment for the mentally ill, acknowledged that while the right had been accepted by society, it had *not* been recognized as a *federal constitutional right.* See Morton Birnbaum, M.D., LL.B. *The Right to Treatment—Some Comments on Certain Legal Developments,* pp. 3, 24 (Statement read on Nov. 4, 1969, before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate).[9] Although the District Court in the Northern District of Georgia and the Court of Appeals for the Fifth Circuit arrived at differing conclusions on the advisability of venturing forth on the new trail, there is no question as to the fact that both courts agreed that it was indeed a *new* trail that was being blazed. Both courts acknowledged that prior to decision of the district court for the Middle District of Alabama in *Wyatt v. Stickney,*[10] the courts had not gone beyond recognizing a statutory right to treatment in those jurisdictions where such a right exists.[11] In the

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[9]Dr. Birnbaum's statement is set forth in its entirety in the "Exhibit Volume" which Petitioners filed with the Court of Appeals.

[10]325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards,* 334 F.Supp. 1341 (1971), *enforced,* 344 F.Supp. 373 (1972), *aff'd in part, remanded in part, and rev'd in part, sub. nom. Wyatt v. Aderholt,* __F.2d__ (5th Cir. No. 72-2634, decided Nov. 8, 1974).

[11]*See Burnham v. The Department of Public Health of the State of Georgia,* 349 F.Supp. 1335, 1339 (N.D. Ga. 1972), *rev'd,* __F.2d__ (5th Cir., No. 72-3110, decided Nov. 8, 1974), and *Donaldson v. O'Connor,* 493 F.2d 507, 519 (5th Cir. 1974). In *Donaldson,* after observing that it was the first court of appeals to which the question had been addressed, the Court of Appeals for

District of Columbia, for example, the Court of Appeals, in a series of split decisions, held that by virtue of a specific federal statute pertaining to the hospitalization of the mentally ill in Washington, D.C., it was appropriate for the judiciary to go into the matter in that jurisdiction. *See Covington v. Harris*, 419 F.2d 617, 623-625 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966). It is true that Chief Judge Bazelon, speaking for the majority of the court in *Rouse*, also indicated by way of *dicta* that he considered a lack of psychiatric treatment beyond custodial care to raise serious constitutional issues. But we think it significant to point out that he did so in the context of commitments for an indefinite period of time *without* the procedural safeguards of a full civil commitment proceeding and solely by virtue of a statute requiring the same where an individual was acquitted of a crime "by reason of insanity" (*i.e.* a legislative reaction to the "Durham Rule"). Judge Bazelon expressly noted that this issue had not been reached by the court because Congress had provided by statute for a right to treatment within the District of Columbia above and beyond custodial care. See *Rouse v. Cameron*, 373 F.2d *supra* at p. 455.

An example of the traditional judicial approach to at-

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the Fifth Circuit referred to two post *Wyatt v. Stickney* decisions which had followed the district court's conclusion in that case that there was a *constitutional* "right to treatment", *i.e. Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974) and *Stachulak v. Coughlin*, 364 F.Supp. 686 (N.D. Ill. 1973). Another recent case has apparently rejected the *Wyatt* view, holding that while mentally retarded persons in state institutions have a right to reasonable "protection from harm", they do *not* have a "right to treatment." *See New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 1973).

tempts to elevate the undoubted moral right to psychiatric treatment to a level of a *federal constitutional* guarantee is seen in *People of the State of New York ex rel. Anonymous v. La Burt,* 218 N.Y.S. 738, 739 (1961). In holding that the fact that New York had a policy of caring for and attempting to cure the mentally ill did not create a right to release in the event of alleged inadequate treatment, the Appellate Division of New York's Supreme Court said:

> "Jurisdiction is inherent in the State over persons within its limits who have been deprived of the use of their mental faculties. It is the duty of the State to protect the community and the mentally ill from their own acts. A mentally ill person may be deprived of his liberty and, if once adjudged to be insane, that person has been deprived of no constitutional right, State or Federal * * *. Commitment for an indefinite time is legal where, as here, the statute makes provision for the mentally ill person to contest, by proof of his sanity, the legality of his confinement after admission * * *."
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> "It is the policy of the State to care for and protect mentally ill persons and, if possible, to cure them of disease * * *. *But this policy does not confer on the mentally ill person a right to release in the event of claimed inadequate treatment.*" (italics added.)

When Petitioner subsequently appealed to this Court, his appeal was dismissed upon motion and treated as a writ for certiorari the petition was denied. *See New York ex rel. Anonymous v. La Burt, State Hospital Director,* 369 U.S. 428 (1962). This Court has similarly declined to review a number of other lower court rejections of the contention that there is a *constitutional* right to treatment. *See. e.g. Donaldson v. O'Connor, State Hospital Superin-*

tendent, 390 U.S. 971 (1968); *New York ex rel. Anonymous v. La Burt, State Hospital Director*, 385 U.S. 936 (1966); *Stephens v. La Burt, State Hospital Director*, 373 U.S. 928 (1963); *see also In re Donaldson*, 364 U.S. 808 (1960).

As we see it, one of the more critical flaws in the Court of Appeals for the Fifth Circuit's analysis of the matter stems from its view that the *only* constitutional justification for civil commitment of the mentally ill is curative treatment (which the Court of Appeals refers to as a *quid pro quo* necessary to justify civil confinement). *See Donaldson v. O'Connor*, 493 F.2d 507, 519-524 (5th Cir. 1974); *Wyatt v. Aderholt*, __F.2d__ (5th Cir. No. 72-2634, decided Nov. 8, 1974). The trouble with this premise is that psychiatric treatment has until now not been thought of as being even the *primary*, much less the *only* permissible justification for confinement of mentally ill persons. The principal justification (and as we see it a constitutionally adequate justification) has historically been avoidance of the injury which the afflicted individual is likely to do to others or himself if he is not confined. *See, e.g.* Ga. Code Ann. §§ 88-506.1, 88-507.1; *Higgins v. United States*, 205 F.2d 650, 653 (9th Cir. 1953); 41 Am.Jur.2d, *Incompetent Persons* § 34; 44 C.J.S. *Insane Persons* § 64.

The *"quid pro quo"* rationale used by the Court of Appeals for the Fifth Circuit to justify its creation of a new constitutional right to psychiatric treatment also seems to be contrary to what this Court has had to say about the matter. In *Greenwood v. United States*, 350 U.S. 366, 375 (1956), for example, the court seems to have recognized "avoidance of injury" as an adequate basis for commitment. It said:

> "The District Court has found that the accused is mentally incompetent to stand trial at the present time and that, if released, he would probably endanger the officers, property, or other interests of the United States . . . ."
>
> "The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner."

In his concurring opinion in *Robinson v. California*, 370 U.S. 660, 668-669 (1962), Justice Douglas, nothing that insanity is a disease, similarly pointed out that:

> " . . . afflicted persons may be confined *either* for treatment *or* for the protection of society, they are not branded as criminals." (italics added).[12]

And in *Jackson v. Indiana*, 406 U.S. 715, 727-732 (1972), the Court, although more directly concerned with commitment procedures, thoroughly analyzed both conceivable justifications for commitment (*i.e.* attempted curative treatment or custodial care so as to avoid injury to others), without the slightest suggestion that either would in the absence of the other be constitutionally inadequate.

Finally, no one appears to dispute the fact that *if* the constitution now confers a right to therapeutic or curative psychiatric treatment for mentally ill persons committed to State institutions (*i.e.* treatment beyond custodial care), the right unquestionably is a new one. Yet this Court has quite recently pointed out in an area of at least as great

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[12]A similar use of the disjunctive rather than the conjunctive is seen in the dissent of then Judge Burger in *Lake v. Cameron*, 364 F.2d 657, 663 (D.C. Cir. 1966), when he spoke of "treatment *or* custodial care" for the mentally ill. We think that here, as in the concurring opinion in *Robinson v. California, supra*, the use of "or" was not inadvertent.

societal concern and importance, public education, that it is not the province of the courts to create substantive constitutional rights under the Fourteenth Amendment's "equal protection" clause. *See San Antonio School District v. Rodriquez*, 411 U.S. 1, 33 (1973). We would suggest that the same reluctance to create a new substantive constitutional right ought to obtain under the "due process" clause in the case at bar. We agree that the furnishing of psychiatric treatment in State mental institutions *to those who might benefit from it* is important. So is public education and many of the other services which the State provides for particular classes of its citizens. But as this Court explained in *Rodriquez*, it is not the importance of a state service which determines whether it is "fundamental" in the sense of being among those rights and liberties protected by the Constitution, but whether the right is:

> "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at pp. 33-34.

Obviously the right to psychiatric treatment is not among those rights "explicitly" protected by the Constitution. Nor do we think it is "implicitly" guaranteed. At the very least we submit that any imposition of this new and quite substantial constitutional obligation upon the States on the theory that it is "implicitly" guaranteed is sufficiently novel as a constitutional proposition to justify this Court's review and determination of the matter. Particularly is this so where critical federal-state relations are involved (*federal* judicial supervision of *state* mental institutions and the probable reordering of *state* determined allocations and expenditures of *state* tax funds), and where the decision of the Court of Appeals appears to be in conflict with what this Court has had to say on the matter.

2. *A particular dosage of curative treatment?*

Even were it to be decided that persons committed to state mental institutions are entitled to therapeutic psychiatric treatment *as a matter of federal constitutional law*, it would still be a rather considerable jump from the position that the courts must see to it that *some* therapeutic or curative treatment be given, to that of requiring the courts to supervise and second guess state officials with respect to the "adequacy" (*i.e.* measure, level, quality, quantity and individualization) of such treatment above and beyond reasonable custodial care. We think that the difference may well be what then Judge Burger had in mind when he said in his concurring opinion in *Dobson v. Cameron*, 383 F.2d 519, 523 (D.C. Cir. 1967):

> "I have grave doubts that we are qualified to oversee mental hospitals in cases of civil commitment but, at the least, there is some statutory basis on which it can be argued that Congress has conferred some power on us at least to inquire into civil commitment cases when it is alleged that one is being detained *without any* treatment." [Emphasis by Judge Burger.]

The same thought similarly appears in his dissenting opinion in *Lake v. Cameron*, 364 F.2d 657, 663 (D.C. Cir. 1966):

> " . . . this Court now orders the District Court to perform functions normally reserved to social agencies *by commanding search for a judicially approved course of treatment* or custodial care for this mentally ill person who is plainly unable to care for herself. Neither this Court nor the District Court is equipped to carry out the broad geriatric inquiry proposed or to resolve the social and economic issues involved." (italics added).

Yet far more germane to the question at hand, which is whether the change of course in constitutional law by the Court of Appeals for the Fifth Circuit in the case at bar is worthy of review by the Supreme Court of the United States, is the fact that in directing district courts to henceforth adjudicate questions concerning the "adequacy" or "dosage" of curative psychiatric treatment in state mental institutions, the Court of Appeals seems to be at odds with this Court's dismissal of the appeal taken from the Supreme Court of New Mexico's decision in *State v. Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969). There a petitioner had asked the state courts to judicially inquire into the question of whether or not he was being given the least restrictive course of treatment possible—this, of course, being one important facet of the many-sided question of the "adequacy" of psychiatric treatment. In flatly rejecting petitioner's contention that his constitutional rights were being violated, the Supreme Court of New Mexico expressly declared that it agreed with the dissent of then Judge Burger in *Lake v. Cameron, supra.*, which as we have already seen was based upon the lack of wisdom of commanding a district court to search for "a judicially approved course of treatment or custodial care" for the mentally ill. Upon appeal, this Honorable Court entered the following *per curiam* order: "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question." *Sanchez v. New Mexico*, 396 U.S. 276 (1970). It is our understanding that such a *per curiam* dismissal is a decision on the merits. *See e.g. Ohio ex rel. Eaton v. Price, Chief of Police*, 360 U.S. 246, 247 (1969) [separate memorandum opinion of Justice Brennan]; *Ahern v. Murphy*, 457 F.2d 363, 364 (7th Cir. 1972). Presumably it is therefore binding upon lower federal courts to the extent that it deals

with the "adequacy of treatment" question in the context of evaluating alternative courses of curative psychiatric treatment to see which is "least restrictive." We respectfully submit there is neither a logical nor a legal reason to distinguish between this particular facet of "adequacy" and the problem of "adequacy" in general (*i.e.* the overall level, measure, degree or dosage of psychiatric treatment). Judicial involvement in either situation leads to the search for "a judicially approved course of treatment." Thus even if it could be said in the first instance that mentally ill persons in state mental institutions are entitled to therapeutic psychiatric treatment as a matter of federal constitutional law, the Fifth Circuit's command to the district courts to take a step beyond seeing merely that *some* psychiatric treatment is given and to further require that the treatment be given according to some judicially prescribed conception of "adequacy", is contrary to *Sanchez*. While we think the importance of the constitutional question involved in and of itself merits its being passed upon by this Court, review is additionally called for because of the fact that the decision of the Court of Appeals for the Fifth Circuit in this case is in apparent conflict with this Honorable Court's dismissal of the appeal in *Sanchez* "for want of a substantial federal question."

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER IT IS CONSISTENT WITH THE ELEVENTH AMENDMENT FOR A FEDERAL DISTRICT COURT TO ENTERTAIN A SUIT BY PRIVATE INDIVIDUALS WHICH WOULD REQUIRE A STATE TO REORDER ITS PRIORITIES AND INCREASE THE LEVEL OF ITS FISCAL SUPPORT FOR THE THERAPEUTIC PSYCHIATRIC TREATMENT IT PROVIDES IN ITS MENTAL INSTITUTIONS.

When all is said and done, what Respondents are asking the federal courts to do is to require the State of Georgia (and presumably all other states) to spend more of their tax dollars for the "diagnosis, care and treatment" of mentally disabled persons in state mental institutions. They insist that they have a *federally* enforceable right to increase the quantity and quality of psychiatric treatment in these *state* institutions to that particular level which they consider to be acceptable (i.e. "constitutionally adequate"). In the absence of the presumably unthinkable "solution" of simply turning mentally disabled persons out of state institutions without any treatment (or even custodial care) whatsoever, this necessarily means either higher taxes or the reordering of legislative priorities as to public expenditures. The United States Court of Appeals for the Fifth Circuit recognized but did not appear to be overly bothered by this problem in *Wyatt v. Aderholt*, __F.2d__ (5th Cir., No. 72-2634, decided Nov. 8, 1974). In noting the Governor of Alabama's argument that based upon the then existing number of mentally disabled persons in that state's mental institutions, the prescribed

remedy would entail an expenditure annually of a sum equal to 60% of the State budget, the Court of Appeals observed only that "any federal decree that state lands be sold or legislative appropriations be reallocated or enjoined would involve state laws of statewide significance" and that the federal injunctive decree "which might be entered" would have to be entered by a three-judge district court. See Appendix, p. 46a. While disclaiming any prejudgment as to the appropriateness of such relief in the case before it (the Court of Appeals thought that depending upon the improvements made such remedies might prove to be unnecessary), its opinion left little doubt as to its belief that such remedies were available to federal district courts as ultimate compliance weapons. Thus in the case at bar it reversed the Georgia district court's decision that it would not "require the State of Georgia to expend additional revenues for the diagnosis, care and treatment of patients in its mental institutions" because "[t]o place such a requirement upon the State, under the circumstances wherein citizens of the State have brought action in federal court, would be in contravention of the Eleventh Amendment to the United States Constitution." See *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1341 (N.D. Ga. 1972), rev'd, __F.2d__ (5th Cir., No. 72-3110, decided Nov. 8, 1974).

We think that the Eleventh Amendment analysis of the district court in this case was plainly correct and that that of the Court of Appeals is plainly wrong. But even plainer, we think, is the fact that the assertion of such an extreme and unprecedented power of federal judicial control over the governmental priorities and budgetary allocations of state legislatures should not be permitted as

being consistent with the Eleventh Amendment without this Court's consideration of the matter and its implications for the federal-state relationship.[13]

In contending that the Eleventh Amendment problem is one which should be passed upon by this Honorable Court and also that its disposition by the Court of Appeals is in apparent conflict with applicable decisions of this Court, we do not overlook the fact that the Court has pointed out that the Eleventh Amendment is not always violated simply because a decree entered against a state official causes him to spend more money (ultimately from the state treasury) than would have been the case had he been left to his former method of operations—"[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

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[13]One of the dangers involved in the transfer of control over the level or measure (i.e. "adequacy") of *state* health or welfare programs (which inevitably involves the ordering of priorities and funding) to *federal* officials (judicial or otherwise) is the strong inducement it presents to the state to water down or even wholly abandon its program. As the district court so perceptively observed:

> "All too often, the instance of judicial overreach can result in a reduction of governmental services to a minimal level for fear of subsequent accountability for some innovative beneficial program. The rigidity of the court process can often stifle intelligent experimentation in dealing effectively with social problems, often to the ultimate detriment of the very persons for whose benefit the litigation is commenced." *Burnham v. The Department of Public Health of the State of Georgia*, 349 F. Supp. 1335, 1343-1344 (N.D. Ga. 1972).

Do Respondents really think that persons committed to, or who have voluntarily been admitted to (about 50%), Georgia's mental institutions will be better served if they are deprived of *all* institutionalized care and treatment and set at large where they can demonstrate their inability to cope with society? We hope not. Yet compliance with the extraordinary sort of order which the Alabama

But while it may to some extent be a matter of degree, we simply cannot believe that a suit by a state's citizens which goes to the heart of what state government is all about — which would both restructure priorities for state programs and substantially revise state budgets — can, if the Eleventh Amendment is to have any practical meaning, be authorized on the ground that this would be a mere "ancillary effect." This Court has long since held the Eleventh Amendment cannot be so easily circumvented and that raids on the state treasury are not to be condoned simply because they are launched against state officials rather than the state itself. See, e.g. *In re Ayers*, 123 U.S. 443, 487-492 (1887).[14] As this Court has so many times pointed out, the applicability of the Eleventh Amendment in suits brought against state officials "is to be determined by the essential nature and effect of the proceeding." *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

In the case at bar we do not believe there is any disagreement at all over the fact that the "essential nature and effect of the proceeding" is to require the State of

district court entered in *Wyatt* respecting staffing requirements could easily lead to this result when the decreed numbers of a particular discipline (e.g. registered nurses, nurse therapists, etc.) simply are not available in the numbers required by the court.

[14]In the case at bar Respondents named a state department and a state board as defendants *eo nomine*, as well as naming a substantial number of the state officials responsible for the administration of affected State agencies and institutions. Although the Court of Appeals did not deal specifically with this issue, we assume that to the extent that it is a suit against these state agencies *per se*, there is no real question as to the fact that it must be dismissed. *See, e.g. Edelman v. Jordan*, 415 U.S. 651, 662-665 (1974); *Employees v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 280 (1973); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945); *Hans v. Louisiana*, 134 U.S. 1 (1890).

Georgia to restructure its priorities and spend more money for the diagnosis, care and therapeutic psychiatric treatment of the mentally disabled in its mental institutions. Certainly this is the view which the Court of Appeals took of the matter in *Wyatt* [whose "principle" the Georgia district court has been directed to follow in the case at bar]. Yet this seems to be precisely the sort of thing which this Court, as early as *In re Ayers*, 123 U.S. 443, 492 (1887), considered to be among the evils the Eleventh Amendment was designed to prevent. After referring to the propriety of a court's exercise of jurisdiction in a suit against state officers where the state had waived their immunity, this Court stressed the fact that this was quite different from:

> " . . . authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State." *Ibid.*

Moreover, the necessary reordering of priorities for public services established by the state legislature would seemingly in and of itself be contrary to this Court's recognition that a state is not to be controlled in the making or carrying out of its *political* decisions in such matters. *Cf. Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 51 (1944); *Fullington v. Shea*, 320 F.Supp. 500, 506 (D. Colo. 1970) [3-judge district court], *aff'd*, 404 U.S. 963 (1971). Viewed in light of its "essential nature and effect" we cannot imagine a case any more obviously "against the State" than the case at bar. We think its dismissal by the district court on Eleventh Amendment grounds was proper and that the district court's decision should have been affirmed by the United States Court of Appeals for the Fifth Circuit.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A SUIT BROUGHT AS A CLASS ACTION TO REQUIRE A STATE TO PROVIDE "ADEQUATE" CURATIVE PSYCHIATRIC TREATMENT FOR THE CLASS PRESENTS A JUSTICIABLE CONTROVERSY.

If something is to be elevated to the level of a constitutional requirement, it would seem useful to first see whether we can determine what the "something" is. Indeed if it is not capable of being identified with such reasonable precision as would permit the imposition of judicially ascertainable and management standards, claims of its deprivation are "nonjusticiable." See, *e.g. Powell v. McCormack*, 395 U.S. 486, 516-517 (1969); *Baker v. Carr*, 369 U.S. 186, 196 (1962). To start with, it must be remembered that the claims asserted in the present case do not deal with those more readily ascertainable *physical* standards incidental to reasonable custodial care (*e.g.* adequate shelter, diet, sanitation and medical care). We are here concerned with the claim of a right to some unspecified measure to therapeutic *psychiatric* treatment above and beyond reasonable custodial care (treatment which currently involves the use of a multidisciplinary staff, apt to include music therapists, occupational and recreational therapists, social workers, clinically trained chaplains, psychiatrists and psychologists as well as individuals involved in those disciplines and services associated with normal custodial care). The differences between the two situations are considerable.[15]

[15]We do not dispute, for example, that the sort of *physical* health and safety hazards which the district court found to exist in Ala-

Respondents say in their complaint that they are entitled to "adequate and effective treatment", and to "constitutionally adequate diagnosis, care and treatment" [A. 8-9]. But what does this mean? Any decree giving relief in the exact terms Respondents request (i.e. ordering defendants "to provide constitutionally adequate treatment" [A. 8]) would almost certainly be a complete nullity. The unraveled mystery as to how one would ever know whether he was in compliance with or in contempt of such an order would result in its being violative of that minimum level of specificity necessary to the grant of valid injunctive relief and "due process."

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bama's institutions in *Wyatt* (*e.g.* inadequate food, filth and insect infestation) may well be amenable to federal judicial relief under the Eighth Amendment, although even here we think that any remedy should be in the alternative, requiring the State to *either* close the facility *or* to eliminate the conditions found to be hazardous to the life and limb of the patients. The distinction between this sort of judicial remedy for serious physical deficiencies in basic custodial care and judicial attempts to resolve questions on the measure of curative treatment for the mentally disabled was recognized in *New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D. N.Y. 1973), where it was concluded that mentally retarded persons in state institutions did have a right to reasonable "protection from harm" but did not have a "right to treatment." Indeed the district judge in the case at bar has clearly demonstrated his recognition of the difference between this necessity of protecting the physical health and safety of confined individuals and attempting to review will-o'-the-wisp standards of curative psychiatric treatment. Only three months before his dismissal of Respondents' complaint in the present case he found the physical conditions of a county jail to be so deplorable as be violative of the Eighth Amendment, and did not hesitate to order (1) that any further usage of the facility was to be conditioned upon immediate remedial action, (2) that not more than 20 persons were to be confined in the jail, and these solely on the ground floor, and (3) that since the age of the facility made fully adequate renovation economically unfeasible, it was not to be used to house any prisoners at all after January 1, 1973. See *Hodge v. Dodd*, ___F.Supp___, (N.D. Ga., No. 16171, decided May 2, 1972).

Nor has the United States Court of Appeals for the Fifth Circuit clarified the matter with its pronouncement that the United States Constitution gives persons civilly committed to state mental institutions a federally enforceable right:

> ". . . to such individual treatment as will help each of them to be cured or to improve his or her mental condition." *Wyatt v. Aderholt*, __F.2d__ (5th Cir. No. 72-2634, decided Nov. 8, 1974) [Appendix p. 32a]; see also *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974).

Quite aside from the anomaly of constitutionally requiring that which is beyond the present power of medical science to give,[16] this holding does not even begin to answer the

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[16]The unpleasant but plain truth of the matter is that mental illness is in many cases irreversible, with little or no chance for either "cure" or "improvement." It is generally thought, for example, that damaged or destroyed brain cells do not regenerate. Some mental illnesses or disabilities are apt to be associated with organic brain damage (*e.g.* senile dementia) and hence not susceptible of curative treatment. And even as to mental illness not associated with organic brain damage the rate of cure ranges from rather low (*e.g.* schizophrenia) to reasonably high (*e.g.* manic-depressive psychosis). Thus in a substantial number of cases proper custodial care is all that reasonably can or should be required. As Dr. Dale C. Cameron, former superintendent of St. Elizabeth's Hospital in Washington, D.C., has observed:

> "Many persons appear to naively and uncritically believe that full recovery should be the treatment objective for all mentally ill patients. While no one would disagree with this belief as a philosophical ideal, it is unfortunately true that, given our present state of knowledge, there are some patients for whom such a goal is not more realistic than is the expectation for the regrowth of an amputated limb." *Symposium: The Right to Treatment*, 57 Georgetown L.J. 673, 729-30 (1969).

The American Psychiatric Association has similarly concluded that:

> ". . . it is unsound to dismiss a procedure as 'purely custodial' or 'purely punishing' without assessing the total circumstances

basic question of what constitutes "treatment." Much less does it give us the slightest hint as to how we are to know whether enough of it is being given.

In attempting to more precisely define "treatment" we find little in the dictionary which would be of any help to a court seeking to "judicially identify" the duty asserted, or to "judicially define" what a breach of the duty would be (see *Baker v. Carr, supra* at p. 198). Webster's Third New International Dictionary (unabridged 1961) includes the following among its definitions of the word "treatment":

> "1: the action or manner of treating as:
> a: conduct or behavior towards another party . . . b: the action or manner of treating a patient medically or surgically."

Looking next to the experts in the field of mental illness for help, we find that aside from the frequent use of other words for the same thing ("therapy" as to the treatment of disease generally or "psychotherapy" with specific reference to the treatment of mental illness), the matter becomes no clearer. Our hopes for even minimal justiciable specificity are indeed rather rudely dashed by the experts. Dr. Thomas S. Szasz, Professor of Psychiatry, State University of New York, Upstate Medical Center, Syracuse, New York, puts his finger on the critical weakness of any court imposed method or standard of treatment of the mentally ill in his article "The Right to Psychiatric Treatment: Rhetoric and Reality", 57 Georgetown Law Journal, 740, 741 (1969), as follows:

"Levine [M. Levine, Psychotherapy in Medical Prac-

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in which it has been prescribed." See 123 American J. Psychiatry, *Position Statement on the Question of Adequacy of Treatment*, pp. 1458, 1459 (1967).

tice 17-19 (1942)] lists 40 methods of psychotherapy. Among these, he includes physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs, and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs and electricity, and brain surgery. *Obviously, the term 'psychiatric treatment' covers every thing that may be done under medical auspices — and more.*

If mental treatment is all the things Levine and others tell us it is, how are we to determine whether or not patients in mental hospitals receive adequate amounts of it? Surely, many of them are already being treated with large doses of 'authoritative firmness', with 'ignoring of symptoms', and, certainly with 'satisfaction of neurotic needs'. This last therapeutic agent has particularly sinister possibilities for offenders. Psychoanalysts have long maintained that many criminals commit antisocial acts out of a sense of guilt. What they 'neurotically' crave is punishment. By this reasoning, indefinite incarceration might itself be regarded as psychiatric treatment." (italics added).

The seemingly infinite variety of opinions on how to care for and treat the mentally disabled has not escaped judicial observation. In *United States v. Klein,* 325 F.2d 283, 286 (2d Cir. 1963) a court noted that:

"Courts of law, unschooled in the intricacies of what may be the most perplexing of medical sciences, are ill-equipped to choose among such divergent but responsible views."

And in *Greenwood v. United States,* 350 U.S. 366, 375

(1956), this Court, after reviewing the testimony of two court-appointed psychiatrists commented that:

> ". . . their testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . ."

We would suggest that with the term "treatment" being as uncertain as it is in the field of psychiatry, its qualification by the word "adequate" only compounds the confusion. How can it be determined whether there is an adequate amount of something when the something is itself incapable of definition?

We do not overlook the fact that in taking note of this question the court of appeals, in *Wyatt v. Aderholt*, __F.2d__, (5th Cir. No. 72-2634, decided Nov. 8, 1974), pointed to the fact that in that case the plaintiffs and the defendant Alabama health officials were able to reach substantial agreement in developing standards. [Appendix, p. 37a]. This may well be a possibility in situations where the "defendant" health officials of a state, to put it charitably, consider a judicially compelled increase in their share of the state's budget to be something less than an unmitigated disaster. We rather suspect that any such agreement on standards would be not nearly so likely in a true adversary proceeding.

In the case at bar we wholly disagree with Respondents' view (among others) that questions about the adequacy of curative psychiatric treatment can properly be considered by a court a class basis. Respondents claim to speak for a class broadly composed of all mentally disabled persons committed to any one of six named mental

institutions of the State of Georgia, regardless of the nature of the particular affliction of each individual member of the alleged class. Yet surely everyone recognizes that what might be good treatment for one patient might be bad or even fatal for another. The concept of imposing uniform standards of psychiatric treatment for the entire class really seems to run into Respondents' other argument (with which we fully agree) that psychiatric treatment must be "individualized." *Cf. Burnham v. The Department of Public Health of the State of Georgia,* 349 F.Supp. 1335, 1343 (N.D. Ga. 1972). Some mentally disabled persons have need of the services of a psychiatrist frequently, while others might need his services rarely if ever. This also applies to the other disciplines currently used in the "team" approach to the treatment of mental illness.

It is at this point that the staffing requirements imposed by the district court in *Wyatt*[17] break down. What constitutes and effective staff-patient ratio for any given discipline depends upon a large number of variables. In a situation where such ratios are legally fixed standards whose modification would require a court order, the delivery of psychiatric treatment designed to meet an *individual* needs is for a number of reasons more apt to be hindered than helped. Since patient needs are highly individual, it also seems self-evident that differing institutions could be expected to have differing staffs depending upon the categories of patients treated. Obviously the differing schools of thought as to which treatment procedures are most effective would also be critical. Should the courts favor the staffing ideas of one group of psychiatrists over the ideas of another group of psychiatrists

[17]344 F. Supp. 373, 383 (N.D. Ala. 1972).

having differing views? Changes in technology and in the availability of particular disciplines are also important. To illustrate, because of the fact that registered nurses are simply not available in the numbers needed, many hospitals have come to rely heavily on licensed practical nurses.

As we see it, the freezing of any particular staffing standard into law would place the practice of psychiatry itself in a strait jacket, quite likely to the ultimate detriment of those very persons who Respondents assert they are attempting to aid.[18] The art of treating mental illness is permeated with disputes and disagreements in all of its aspects, including matters of staffing and treatment procedures. It is also an area of change, growth, and hopefully continued improvement. We respectfully submit that in the case at bar the district court was most perceptive in recognizing the inherent danger of judges engaging in the unlicensed practice of psychiatry. Quite aside from the fact that such an "unlicensed practice" could quickly become "malpractice" if amendments to the sort of judicial supervisory decrees contemplated by Respondents do not keep up with developments in psychiatric treatment, there is the very real danger of both wasting public moneys and throttling progress if psychiatry is to be frozen to

[18]Our criticism of a judicial imposition of fixed staffing requirements as a legal standard is by no means prompted by a concern over existing staff-patient ratios in Georgia. Dr. Birnbaum, in his Statement of November 4, 1969, before the Subcommittee on Constitutional Rights, Committee on the Judiciary, *"The Right to Treatment—Some Comments on Certain Legal Developments"*, refers, for example, to physician-patient ratios of 1 to 500 in New York and 1 to 1,000 in Florida. If Respondents had taken the trouble to look into the situation in Georgia before filing their suit they would have found that the state's most overcrowded facility for the treatment of mental illness, Central State Hospital at Milledgeville, the ratio was an entirely acceptably 1 physician to 75 patients.

standards which even if arguably beneficial today would almost certainly be inconsistent with the highest level of the practice of the art tomorrow. Thus the district court concluded that:

> "In attempting to grapple with issues beyond the pale of judicial definition and resolution the Court renders a disservice to the community and stifles the needed creative and imaginative efforts of its concerned individual citizens." *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1343 (N.D. Ga. 1972).

We think that the controversy presented by the case at bar is nonjusticiable, and that the district court was correct in so holding. The implications of the court of appeals' reversal are for reasons already stated great indeed, and would appear to merit this Honorable Court's review of the matter.

CONCLUSION

Any individual having a bona-fide complaint over his treatment in Georgia's mental institutions is possessed of a number of adequate state legal remedies. In addition to those set forth in the mental health act itself which reach to any and all aspects of his *individual* treatment, see Ga. Code Ann. § 88-502.11, medical malpractice suits are also well recognized in Georgia, see Ga. Code Ann. § 84-924, not to mention ordinary tort action where injury results from a breach of a duty of care. The district court concluded that for this reason too Respondents' case was subject to dismissal. *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335, 1343 (N.D. Ga. 1972). We would submit that at the very least this existence of such adequate state legal remedies is yet

an additional reason for federal courts to avoid the new trail of constitutional law which Respondents and the United States Court of Appeals for the Fifth Circuit would *blaze*. For all of the reasons stated herein we think that the issues raised in this case are significant constitutional questions and of sufficiently vital importance to our federal system to justify this Honorable Court's issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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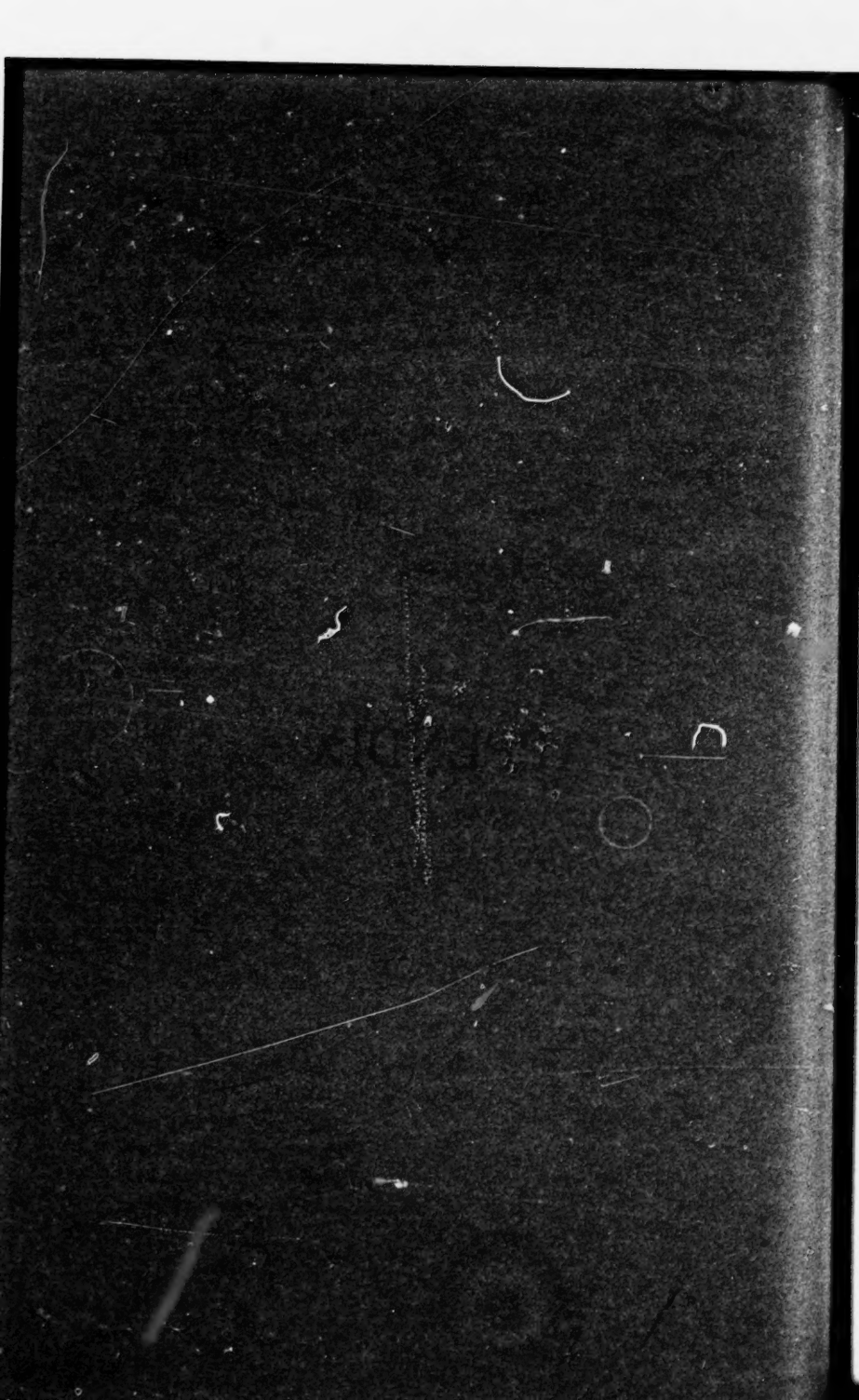

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

A. J. BURNHAM, et al.,
Plaintiffs,

vs.

THE DEPARTMENT OF PUBLIC HEALTH OF THE STATE OF GEORGIA, et al.,
Defendants.

CIVIL ACTION
NO. 16385

ORDER ON MOTIONS TO DISMISS

In this class action plaintiffs request injunctive and declaratory relief pursuant to the provisions of 42 U.S.C. § 1981, 1983 and 28 U.S.C. § 1343(3) & (4). The parties-plaintiff, residents of Georgia, are all now or have been patients at one or more of the mental health institutions operated by the Department of Public Health of the State of Georgia (hereinafter "the Department"). The defendants are State officials responsible for the operation of such institutions, in varying degrees, and include the 18 member Board of Health which directs and controls the Department, the Director and Deputy Director of the Department, the Director of the Division of Mental Health and the Director of Institutions, Division of Mental Health. Also included as defendants are six superintendent/directors of individual institutions and two Judges of the Court of Ordinary.

The gravamen of the complaint is that the defendants are providing *constitutionally* inadequate diagnosis, care, and treatment to the plaintiffs and all those similarly situated. Additionally it is asserted that persons, as yet unknown, will be committed by the Judges of the Court of Ordinary to what amounts to penal or custodial status without the benefit of due process of law.[1]

The plaintiffs' prayer asks this Court to declare (1) that patients confined to any state-owned or operated hospital or facility utilized for the diagnosis, care and treatment of mentally ill or mentally retarded persons are *constitutionally* entitled to adequate and effective treatment and (2) that each of the six institutions named in the complaint is unfit to provide *constitutionally* adequate and effective treatment for patients confined therein. Futher, plaintiffs urge this Court to order the appropriate parties-defendant to provide *constitutionally* adequate treatment for any patient confined to the six named institutions, or to any other state-owned or operated facility. Plaintiffs also seek an injunction (1) preventing the defendants from operating any of the six named institutions in a manner that does not conform to the *constitutionally* required standards for diagnosis, care and treatment of mentally ill or mentally retarded persons and (2) prohibiting the named Judges of the Court of Ordinary and "members of their class" from committing any person to any of the six named institutions or any other state-owned or operated facility until such time as such institution or facility has made provisions for *constitutionally* adequate diagnosis, care, and treatment of patients.

[1]Plaintiffs do not directly or indirectly attack the commitment procedures of the State of Georgia. This particular assertion is nowhere explained or argued in plaintiffs' brief of law and argumentation.

Lastly, plaintiffs ask this Court to order the appropriate defendants to prepare a comprehensive, *constitutionally* acceptable plan to provide adequate and effective treatment for all patients confined to state mental health facilities.

Prior to an examination of this case on its merits this Court deems some preliminary discussion appropriate. This Court is understandably concerned with the condition of that lamentably increasing number of human beings confined to mental health institutions. Certainly on moral grounds the proposition that the nation's mentally ill should be provided the best possible diagnosis, care and treatment is commendable. As citizens, we should be proud of any efforts to so provide for the needs of our fellow man. Those efforts include the enactment in 1969 by the Georgia General Assembly of legislation that has been heralded as one of the most advanced statutory treatments of the subject of hospitalization of the mentally ill in this nation. *See* Ga. Laws 1969, pp. 505-545; Ga. Code Ann., Chap. 88-5. The commitment to progress in the area of care for the mentally ill in Georgia is reflected in the increase from approximately $13,000,000.00 in 1960 to the $90,000,000.00 level in 1972 of funds provided by the General Assembly for the care of the mentally ill. Efforts have also been undertaken to decentralize and establish regional hospitals throughout the State by means of an extensive building program. Against this backdrop of effort, the Court considers the legal aspects of this matter.[2]

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[2]This petition and the defendants' motions present novel questions of law. Counsel for both sides have submitted excellent presentations of their respective position. They are to be commended for their efforts and assistance to the Court.

JURISDICTION PURSUANT TO 28 U.S.C. § 1343

The defendants assert that the complaint should be dismissed for want of jurisdiction over the subject matter in that it fails to raise a substantial federal question.

The courts have generally taken the view that 42 U.S.C. § 1983[3] establishes the substantive right under which a complaintant may proceed to vindicate a violation of his civil rights. Jurisdiction has been granted pursuant to 28 U.S.C. § 1343 (3) to allow consideration of the alleged claim arising under 42 U.S.C. § 1983. *Baldwin v. Morgan,* 251 F.2d 780 (5th Cir. 1958). Germane to both 28 U.S.C. § 1343 and 42 U.S.C. § 1983 is the requirement that the conduct complained of be exercised "under color" of state law. The courts, when considering claims under the two aforementioned sections have established the following two prerequisites: (1) that the defendant(s) act "under color" of state or local law *and* (2) that the plaintiff be subjected to a deprivation of some rights, privileges, or immunities secured by the constitution and laws of the United States. *United States v. Classic,* 313 U.S. 299 (1941); *Basista v. Weir,* 340 F.2d 74 (3d Cir. 1965); *Stringer v. Dilger,* 313 F.2d 536 (10th Cir. 1963); *Marshall v. Sawyer,* 301 F.2d 639 (9th Cir. 1962).

The plaintiff's complaint in the instant case is predicated squarely upon the proposition that the "adequacy" of the diagnosis, care, and treatment of patients in Georgia's mental health institutions is not merely a matter of State law[4] but is a *federal constitutional* issue. Indeed

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[3]The jurisdictional considerations applicable to 42 U.S.C. § 1983 apply with equal force to 42 U.S.C. § 1981.

[4]See Ga. Laws 1969, pp. 505-545, the majority of which is set forth in Chapter 88-5, Ga. Code Ann.

under the second prerequisite noted above the plaintiffs are required to show a deprivation of a *federal* right in order to invoke jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. This Court is in agreement with plaintiff's counsel when he states, "It is true that in dealing with this issue, we are somewhat in the forefront of the law . . ."[5], to the extent that a right to treatment for the mentally ill (if such a right indeed exists absent a statutory mandate) is a constitutionally required right.

As pointed out by the defendants, whether a State shall provide a particular governmental service, and if so in what amount (both qualitatively and quantitatively) are generally questions which address themselves exclusively to State law and do not raise federal constitutional issues. *See Fullington v. Shea,* 320 F.Supp. 500 (D. Colo. 1970) (3 judge court), aff'd., 404 U.S. 963 (1970). *Cf. McGowan v. Maryland,* 366 U.S. 420 (1961). In the matter now before the Court there is a law of the State of Georgia which requires treatment of those individuals confined to the State's mental health institutions.[6] The argument herein is not that there is some sort of invidious discrimination based upon race or similarly prohibited criteria being practiced whereby an unequal distribution or application of the benefits of this State law is being rendered. Plaintiffs are directly challenging the "adequacy" of the treatment, care, and diagnosis being provided in the State's mental health institutions.[7]

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[5]Brief of Plaintiffs in Opposition to Defendants' Motions to Dismiss, p. 3.

[6]See Ga. Code Ann. § 88-502.2.

[7]Plaintiffs do not assert that "treatment" is not being provided in the Georgia mental health facilities, but that the "adequacy" (i.e. quality, quantity, individualization, and level) of treatment is

The plaintiffs urge this Court, therefore, to declare the existence of a *federal constitutional* right to treatment (to encompass "care" and "diagnosis") for the mentally ill and to define the same. This Court can find no legel precedent for such a declaration and to the contrary finds persuasive authority compelling an opposite conclusion.[8]

The leading exponent of the declaration of a right to treatment for the mentally ill is Morton Birnbaum, M.D., LL.B., who for the past fifteen years has written a number of articles on the subject and has been instrumental in "law reform" litigation. Dr. Birnbaum himself has conceded that while such a right to treatment has been accepted by society, it has not been recognized as a federal constitutional right.[9]

Not every governmental function results in an individual right. See *Collins v. Hardyman,* 341 U.S. 651 (1951); *Niklaus v. Simmons,* 196 F.Supp. 691 (D. Neb. 1961). Looking at an analogous area of recent great societal concern and importance, education, we find some instructive authority. In *Flemming v. Adams,* 377 F.2d 975, 977 (10th Cir. 1967), *cert. denied,* 389 U.S. 898

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deficient and that said "adequate treatment" is mandated by the constitution of the United States. There does exist a dispute between counsel as to whether mere custodial care constitutes "treatment" (as required by the State law). That issue is more appropriately for the courts of Georgia to resolve. See *City of Meridian v. Southern Bell Tel. & Tel. Co.,* 358 U.S. 639, 640-641 (1959).

[8]For a comprehensive discussion of the "right to treatment" for the mentally ill, see Symposium: The Right to Treatment, 57 Georgetown L.J. 673 (1969).

[9]See Birnbaum, "The Right to Treatment — Some Comments on Certain Legal Developments" (Statement of November 4, 1969 before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate).

(1967), a claim that the right to a public education was secured by the United States Constitution was rejected as follows:

> "Although the importance of education to our democratic society is obvious to all . . . we do not agree that the right to an education is among those rights guaranteed by the federal constitution."

See Peacock v. Rigsbee, 309 F.Supp. 542 (N.D. Ga. 1970). While the 14th Amendment guarantees equal protection of the laws, its does not create any new rights in itself.

With the exception of a recent Alabama decision discussed herein below, the courts have not gone beyond recognizing a *statutory* right to treatment in those jurisdictions where such a right exists. The Court of Appeals for the District of Columbia, in a series of split decisions, has held that under federal statutes regulating the hospitalization of the mentally ill in Washington, D.C., (tantamount to state laws in the District) patients there can obtain judicial review of the adequacy of their treatment, including the question of whether the least restrictive course of treatment available is being utilized. *See Covington v. Harris,* 419 F.2d 617 (D.C. Cir. 1969); *Rouse v. Cameron,* 373 F.2d 451 (D.C. Cir. 1963); *Lake v. Cameron,* 364 F.2d 657 (D.C. Cir. 1966).

Chief Judge Bazelon indicates by way of dicta in *Rouse v. Cameron,* supra, that the lack of psychiatric treatment beyond custodial care raises serious constitutional questions. These "constitutional questions" were not reached due to the finding of the court that Congress had provided for a *statutory* right to treatment (D.C. Code § 21-562, Supp.V, 1966). *See Rouse v. Cameron, supra* at 453.

Rouse arose on a petition for habeas corpus challenging involuntary confinement in a mental hospital on being automatically committed under a D.C. statute providing for same on being acquitted of an offense by reason of insanity. *See Dobson v. Cameron,* 383 F.2d 519, 523 (D.C. Cir. 1967) (concurring opinion). Moreover, the majority opinion stressed that, "The purpose of involuntary hospitalization is treatment, not punishment." *Rouse v. Cameron, supra* at 452.

It is important to note that an articulate minority of the Disrict of Columbia Court of Appeals does not agree that the *statute* makes it proper for courts to go into such matters of "adequacy" and the evaluation of alternative courses of treatment. Judge Warren E. Burger stated in *Lake v. Cameron, supra* at 663:

> ". . . this Court now orders the District Court to perform functions normally reserved to social agencies by commanding search for a judicially approved course of treatment or custodial care for this mentally ill person who is plainly unable to care for herself. Neither this Court nor the District Court is equipped to carry out the broad geriatric inquiry proposed or to resolve the social and economic issues involved."

See also Dobson v. Cameron, 383 F.2d 519, 523 (D.C. Cir. 1967).

In the instant case we are presented with no *federal* statute mandating treatment as was the basis for relief in the District of Columbia cases cited hereinabove. What we do have is simply a *Georgia* statute which provides:

> "Right to care and treatment. — The policy of the State is that no person shall be denied care and treatment of mental disorder, and no services shall be delayed at a facility of the State or a political sub-

> division of the State because of inability to pay." Ga. Code § 88-502.2.

Even the Georgia act differs from the District of Columbia act in that the Court in *Rouse v. Cameron, supra,* construed that statute to predicate involuntary confinement solely on the premise that treatment would be afforded. This Georgia law, however, recognizes other grounds for involuntary committal:

> "Criteria for nonobjecting or involuntary hospitalization. — A person being within the State may be hospitalized under sections 88-506.2 through 88-506.7 if he is mentally ill and is (a) *likely to injure himself or others if not hospitalized* or (b) incapable of caring for his physical health and safety." [Emphasis added] Ga. Code § 88-506.1.[10]

This Court is of the oninion that plaintiffs have failed to demonstrate or sufficiently allege the deprivation of a *federally* protected right. Since plaintiffs have not been deprived of any federal right, they cannot maintain this action pursuant to 42 U.S.C. § 1981 & 1983 and 28 U.S.C. § 1343(3) & (4). *See City of Greenwood, Miss. v. Peacock,* 384 U.S. 808 (1966); *Basista v. Weir,* 340 F.2d 74 (3d Cir. 1965); *Stringer v. Dilger,* 313 F.2d 536

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[10]Plaintiffs' counsel asserts that he "cannot believe that defendants' counsel is serious in his discussion . . . about the justification for civil commitment being primarily avoidance of injury to themselves and others. If this were so there would be no need to even amuse ourselves with the little game of calling these institutions hospitals." Apparently plaintiffs' counsel believes that the *sole* justification for confining mentally ill individuals is to treat them. While this is perhaps a noble, even desirable, viewpoint it totally ignores the realities of the situation. Those realities are reflected in the same Georgia law that in fact provides for a right to treatment but predicates the attendant confinement on the basis of protection of society and protection of the individual from himself and others.

(10th Cir. 1963); *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962).

This Court takes notice of Chief Judge Johnson's rulings in the Middle District of Alabama. *See Wyatt v. Stickney*, 334 F.Supp. 1341 (M.D. Ala. 1971); *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971). This Court respectfully disagrees with the conclusion reached by that court in finding an affirmative federal right to treatment absent a statute so requiring. Judge Johnson relied solely for authority on *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967) and *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969) both of which were predicated upon the local District of Columbia statute. The factual context in those Alabama decisions (budgetary cuts by the State legislature causing further deterioration of an existing deficient institutional environment) is also substantially different from the existent situation in the Georgia mental health institutions.

LACK OF JURISDICTION COMPELLED BY ELEVENTH AMENDMENT

Plaintiffs correctly argue that in suits against State officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment. *See Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). The Court is also aware that States have been forced to assume financial burdens in other cases involving the deprivation of constitutionally protected rights. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (1969). However, in the instant case there has been no showing of a denial of a *constitutionally* protected right

nor a *federally* guaranteed statutory right.

In the case at bar the Court will not require the State of Georgia to expend additional revenues for the diagnosis, care, and treatment of patients in its mental health institutions, said treatment and care being mandated by *State* law. To place such a requirement upon the State, under the circumstance wherein citizens of the State have brought action in federal court, would be in contravention of the Eleventh Amendment to the United States Constitution. *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Reid*, 322 U.S. 47 (1944); *Worchester County Trust Co. v. Controller of California*, 302 U.S. 292 (1937); *Hans v. Louisiana*, 134 U.S. 1 (1890); *In Re Ayres*, 123 U. S. 443 (1887); *Scott v. Board of Supervisors of Louisiana State Univ.*, 336 F.2d 557 (5th Cir. 1964). For the above-stated reason this Court finds that a conclusion as to the lack of jurisdiction over the person of named defendants is also compelled by the Eleventh Amendment to the United States Constitution.

FAILURE TO PRESENT A JUSTICIABLE ISSUE

The question of justiciability has two facets. "First, we must decide whether the claim presented and relief sought are of the type which admit of judicial resolution." *Powell v. McCormack*, 395 U.S. 486, 516-517 (1969). That is, the Court must determine whether "the duty asserted can be judicially identified and its breach judicially defined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186, 198 (1962). Secondly, justiciability requires a determination of whether the structure of the Federal Government renders the issue presented a "political question".

For the purposes of this case the Court will focus its inquiry into whether the plaintiffs' claim and requested relief provide such reasonably specific, judicially ascertainable and manageable standards as are required for a controversy to be justiciable within the context of the above definition.

Plaintiffs' basic claim is that mental health patients are constitutionally entitled to something more than custodial care and treatment. Plaintiffs assert that said patients are entitled to "adequate and effective treatment", "constitutionally adequate treatment" or adequate "diagnosis, care and treatment." This Court must therefore determine whether "adequate and effective treatment", "constitutionally adequate treatment", and adequate "diagnosis, care and treatment" can "be judicially identified and its breach judicially defined, and whether protection for the right asserted can be judicially molded". *Baker v. Carr, supra* at 198. No simple solution to such a task is available, hence the need for the following analysis.

Common to each of the plaintiffs' characterizations of the alleged "right" involved is the word "treatment". The dictionary provides meager assistance to the Court in attempting to "judicially identify" the duty asserted or "judicially define" what the breach of that duty would be, to wit:

> "treatment: 1. the action or manner of treating as:
> a: conduct or behavior towards another party
> . . . b: the action or manner of treating a patient medically or surgically."
> Webster's Third New International Dictionary (unabridged 1961).

Experts in the field of mental illness are also of little help other than in providing analogous terminology, e.g. "ther-

apy". Defendants cite the following comments by Dr. Thomas S. Szasy (Professor of Psychiatry, State Univ. of N.Y.) in his article "The Right to Psychiatric Treatment: Rhetoric and Reality", 57 Georgetown Law Journal 740, 741 (1969) as indicative of the problem:

> "Levine [M. Levine, Psychotherapy in Medical Practice 17-19 (1942)] lists 40 methods of psychotherapy. Among these, he includes physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs and electricity, and brain surgery. *Obviously the term 'psychiatric treatment' covers everything that may be done under medical auspices — and more.*
>
> If mental treatment is all the things Levine and others tell us it is, how are we to determine whether or not patients in mental hospitals receive adequate amounts of it?" [Emphasis added]

In *Greenwood v. United States*, 350 U.S. 366, 375 (1955), the Supreme Court also noted the transiency of the field when reviewing the testimony of two court-appointed psychiatrists, declaring:

> ". . . their testimony illustrates the uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment. . . ."

The addition of qualifying and modifying language such as "adequate" or "constitutionally adequate" to a word

of uncertain meaning like "treatment" does nothing to clarify the confusion but serves only to compound it. It is therefore the opinion of this Court that the claimed "duty" (i.e. to "adequately" or "constitutionally treat") defies judicial identity and therefore prohibits its breach from being judicially defined.[11] The problem of mental illness is a matter of urgent social concern. The members of the community should be made aware of the existent problems and should work through their elected representatives to solve those problems. This Court, however, is not the appropriate vehicle for the stimulation of public awareness. In attempting to grapple with issues beyond the pale of judicial definition and resolution the Court renders a disservice to the community and stifles the needed creative and imaginative efforts of its concerned individual citizens.

ADEQUATE REMEDIES AT LAW AVAILABLE TO PLAINTIFFS

The resolution of this issue involves a consideration of additional conflicting positions arising in the respective arguments of counsel. It is the opinion of this Court that there exists multiple adequate remedies at law available to the plaintiffs on an *individual* basis through which redress may be obtained. In such a situation the prayer for injunctive relief must be denied and the claim dismissed. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500

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[11]Plaintiffs' counsel asserts in brief of law: "Plaintiffs believe that the custodial care that exists will be found to be the result of the 'justiciable issue' of inaction after incarceration on the part of the State officials". Such "justiciable issues" would more appropriably be raised in an action in State court under the applicable Georgia law. (Right to treatment. — Ga. Code Ann. § 88-502.2;-502.3; Medical malpractice — Ga. Code Ann. § 84-924.)

(1959); *cf. Carson v. City of Fort Lauderdale*, 293 F.2d 337 (5th Cir. 1961).

Plaintiffs state that a class action procedure is unavailable under Georgia law since the analogous federal rule (Rule 23, F.R.Civ.P.) has a subsection (3) under Rule 23(a) whereas the Georgia law does not. However, the Supreme Court of Georgia in *Georgia Investment Co. d/b/a Dixie Loan Co. v. Norman*, No. 27146, decided May 3, 1972, has declared that under section 23 of the Civil Practice Act (Ga. Code Ann. § 81A-123), a class action may be filed where the character of the right sought to be enforced is common, although such right is neither joint, nor derivative, nor several and the object of the litigation is not the adjudication of claims which do or may affect specific property involved in the action. Plaintiffs assert that the remedies of habeas corpus, medical malpractice, and ordinary tort actions would not function to provide an adequate remedy in that the wrong sought to be remedied affects the system of care and treatment as a whole and not on an individual basis; that individual action could not affect the entire scheme of treatment. The Court finds such a description inconsistent with plaintiffs argument that each individual patient should have his particular therapy or treatment personalized. The Court believes that any meaningful attempt to ascertain whether "treatment" or "adequate care and treatment" is being afforded patients is best determined by the courts of the State of Georgia applying the applicable State law on an individual basis.[12] As argued by defendants, ". . . [T]he question of what in detail constitutes 'adequate treatment'

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[12]This is assuming the State courts can define "treatment" and determine its adequacy as mandated by Ga. Code Ann. § 88-502.2;-502.3.

is simply not capable of being spelled out as a mathematical formula which could be applied to and would be beneficial for all patients. Everyone knows that what might be good treatment for one patient could be bad or even fatal for another."

Since each patient is an individual and what is good treatment for one might mean disaster for another, the only feasible way in which the adequacy of treatment could ever be measured is against the needs of a particular patient. Under these circumstances it is the opinion of this Court that the class action requisites of Rule 23 are not met in that (1) there would be relatively few questions of law or fact common to members of the alleged class, (2) the claims of the plaintiffs would not be typical of the claims of the class, and (3) plaintiffs are not necessarily representative of or in a position to adequately protect the interests of the class. *See Hamer v. Campbell,* 358 F.2d 215 (5th Cir. 1966); *Wilson v. Kelley,* 294 F.Supp. 1005 (N.D. Ga. 1968), *aff'd,* 393 U.S. 266 (1968).

The Court is persuaded that some matters are left for legislative and executive resolution short of federal judicial review. All too often, an instance of judicial overreach can result in a reduction of government services to a minimal level for fear of subsequent accountability for some innovative beneficial program. The rigidity of the court process can often stifle intelligent experimentation in dealing effectively with social problems, often to the ultimate detriment of the very persons for whose benefit the litigation is commenced. It is beyond the technical expertise of this, and presumably most, judges to endeavor to administer a state-wide mental health program and its direction is best left to the enlightened direction of the elected representatives of the people. It is true that

federal courts have been drawn into administrative rules in other areas, the worth of which efforts have ultimately to be judged. However, in those instances it has followed the clear mandate of the Congress or the clear declaration of a federal constitutional right by our highest court, neither of which is present here.

For the reasons stated, the motion to dismiss must be granted and the petition is, therefore, dismissed.

IT IS SO ORDERED.

This the 3rd day of August, 1972.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

A. J. BURNHAM, Edith Summerhall, Christopher C. Nelson, William J. Kelly, Ray Gormley, Julium McLendon, and David P. Thompson, Jr., for themselves jointly and severally and for all others similarly situated, Plaintiffs-Appellants,

v.

The DEPARTMENT OF PUBLIC HEALTH OF the STATE OF GEORGIA et al., Defendants-Appellees.

No. 72-3110.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1974.

Appeal from the United States District Court for the Northern District of Georgia, Sidney O. Smith, Jr., Chief Judge.

Before WISDOM, BELL and COLEMAN, Circuit Judges.

PER CURIAM:

The decision of the district court is reversed on the authority of our decisions in Donaldson v. O'Connor, 5 Cir. 1974, 493 F.2d 507, and Wyatt v. Aderholt, 5 Cir. 1974, ____ F.2d ____. The case is remanded to the district court for further proceedings consistent with the principles announced in those decisions.

Reversed and remanded.

Ricky WYATT, By and Through his aunt and legal guardian Mrs. W. C. Rawlins, Jr., et al., etc., Plaintiffs-Appellees,

v.

Charles ADERHOLT, as Commissioner of Mental Health, et al., Defendants,

The Alabama Mental Health Board, an Agency of the State of Alabama, and George C. Wallace, as Governor of Ala., Defendants-Appellants.

No. 72–2634.

United States Court of Appeals, Fifth Circuit.

Nov. 8, 1974.

Appeals from the United States District Court for the Middle District of Alabama.

Before WISDOM, BELL and COLEMAN, Circuit Judges.

WISDOM, Circuit Judge:

In this case, we must decide whether federal district courts have the power to order state mental institutions to provide minimum levels of psychiatric care and treatment[1] to persons civilly committed to the institutions.

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[1]"Treatment" means care provided by mental health professionals and others that is adequate and appropriate for the needs of the mentally impaired inmate. Treatment also encompasses a humane physical and psychological environment. The term "habilitation", used by the parties and amici in the district court and by the district

The guardians of patients civilly committed to three Alabama facilities for the mentally handicapped brought this class action on behalf of their wards and other civilly committed patients at those institutions. The Honorable Frank M. Johnson, trial judge, held that mentally ill patients "have a constitutional right to receive such individual treatment as will give each of them a reasonable opportunity to be cured or to improve his or her mental condition". Wyatt v. Stickney, M.D.Ala. 1971, 325 F.Supp. 781, 784. In a later order, Judge Johnson held that the mentally retarded patients have a constitutional right to "such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society". Wyatt v. Stickney, M.D.Ala.1972, 344 F.Supp. 387, 390. The district court found that conditions at the three facilities deprived the plaintiffs of these constitutional rights, and ordered the defendants-appellants, Alabama officials responsible for the administration of the state's mental health programs, to implement a detailed set of standards designed to ensure the provision of minimally adequate treatment and habilitation at the institutions. From this order, the Alabama Mental Health Board and Alabama's Governor George C. Wallace bring separate appeals.

Together, the Mental Health Board and the Governor advance six major contentions on appeal. They contend

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court in is order of April 13, 1972 (Partlow State School and Hospital) is a term used to describe that treatment which is appropriate to the condition of the mental retardate. For convenience, in this opinion we group "habilitation" and "treatment" under the single term "treatment", and to include those instances where rehabilitation is impossible in which event the requirement is minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary. Donaldson v. O'Connor, 5 Cir., 1974, 493 F.2d 507, 522.

(1) that the district court erred in holding that civilly committed mental patients have a constitutional right to treatment; (2) that the court lacked jurisdiction because the suit was in effect a suit against the state proscribed by the eleventh amendment; (3) that the case involves rights and duties not susceptible to determination by judicially ascertainable and manageable standards, and therefore presents a non-justiciable controversy; (4) that the order of the district court invades a province of decisionmaking exclusively reserved to the state legislature; (5) that the plaintiffs were not entitled to equitable relief because they had adequate remedies at law to protect the rights they asserted; and (6) that the district court erred in awarding plaintiffs a reasonable attorneys' fee.

Neither in the district court nor on appeal to this Court have the defendants challenged the detailed set of standards articulated by the district court. They have conceded that if there is a constitutional right to treatment enforceable by a suit for injunctive relief in federal court, those standards accurately reflect what would be required to ensure the provision of adequate treatment.

I.

A. *The proceedings below*

This case began innocuously enough, when a cut in the Alabama cigarette tax forced the state to fire 99 professional, subprofessional, and intern employees[2] at the

[2]The 99 employees included 41 who were assigned duties such as food service, maintenance, typing and other mechanical duties not involving direct patient care; 26 persons involved in planning social and other recreational activities for the patients; nine persons from the department of psychology; eleven from the social service department; three registered nurses, two physicians, one dentist, and six dental aides.

Bryce Hospital, a state-run institution for the mentally ill at Tuscaloosa. The plaintiffs filed their complaint October 23, 1970. The complaint named two classes as plaintiffs. One, represented by Ricky Wyatt and two other named plaintiffs, appellees here, consisted of the patients at Bryce. The other, represented by five of the then recently terminated employees, consisted of the employees who had been dismissed for budgetary reasons. The defendants were Stonewall B. Stickney, then Executive Officer of the Alabama State Mental Health Board; Dr. John V. Hottel, his Chief Deputy; the members of the Board; then Governor Albert P. Brewer, both in his capacity as Governor and in his capacity as a member of the Board; and Judge Perry O. Hooper, Probate Judge of Montgomery County, both individually and as a representative of the class consisting of all probate judges in Alabama.

The complaint alleged that the defendants had effected the staff reductions purely for budgetary reasons; that the discharges of the 99 employees had been accomplished without notice and a hearing, and violated the employees' rights under the due process clause; and that as a result of the discharges the patients at Bryce would not receive adequate treatment. The complaint sought injunctive relief requiring the defendants to insure that treatment programs then being administered at Bryce would not be interrupted or altered, and requiring the defendants to rescind the terminations of the 99 employees.

The original complaint did not allege that treatment levels at Bryce had been inadequate before the terminations. For reasons not entirely clear from the record before us, however, the focus of the litigation soon shifted from the effects of the October 1970 terminations to questions of the overall adequacy of the treatment af-

forded at the Alabama state mental hospitals. On January 4, 1971, the plaintiffs amended the complaint to add prayers that the defendants be enjoined from operating Bryce "in a manner that does not conform to constitutional standards of delivering adequate mental treatment to its patients"; that the Court order defendants to prepare a "comprehensive constitutionally acceptable plan to provide adequate treatment in any state mental health facility"; and that the court declare that patients confined to a state mental health facility are entitled to "adequate, competent treatment".

On March 12, 1971, the district court ruled on the plaintiffs' motion for a preliminary injunction. 325 F.Supp. 781. The court's opinion reflected the shift in the focus of the case. In its opinion, the court declared that patients "involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings" are "committed for treatment purposes" and so "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition". 325 F.Supp. at 784. The court found that the treatment programs in effect before the institution of a staff reorganization then in progress were "scientifically and medically inadequate", failing to "conform to any known minimums established for providing treatment for the mentally ill". *Id.* The court stated that it was not at that time in a position to determine whether the treatment which would be provided after the reorganization was completed would be adequate. Accordingly, the court allowed the defendants ninety days to report progress made in the reorganization plan, and to file with the

Court a "specific plan" for the provision of adequate treatment at Bryce. Also in the March 12 order, the court invited the United States, through the Departments of Justice and Health Education and Welfare, to appear as amicus.

On August 4, 1971, the plaintiffs amended their complaint to allege that the Searcy Hospital at Mount Vernon, Alabama, the one other state hospital for the mentally ill in Alabama, and the Partlow State School and Hospital, Alabama's state facility for the mentally retarded, were being operated in a constitutionally impermissible manner.

On September 13, 1971, six months after the March 12 order, the defendants filed their report on proposed standards of adequate treatment and their implementation. Objections to the report were later filed by the plaintiffs and by the United States, as well as by several interested private organizations which had been granted leave to appear as amici.[3]

The court announced its conclusions upon review of the report and the objections to it in an opinion issued December 10, 1971. 334 F.Supp. 1341. In this opinion, the district court held that there are three "fundamental conditions for adequate and effective treatment": a "humane physical and psychological environment"; qualified

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[3]By order entered August 20, 1971, the district court granted the motion filed by the American Civil Liberties Union, the American Orthopsychiatric Association, the American Psychological Association, and the American Association on Mental Deficiency, for leave to appear as amici. In this Court, these amici have been joined by the National Association for Mental Health and the National Association for Retarded Children. The six have filed a joint brief in this Court.

The district court expressed its gratitude to these organizations for their valuable assistance in this difficult and complex case, 344 F.Supp. 375, 390, and we do so, too.

staff "in numbers sufficient to administer adequate treatment"; and individualized treatment plans. The court held that the reports before it showed "rather conclusively" that the treatment programs at Bryce did not meet any of these conditions. It also noted that conditions at Searcy and Partlow seemed little better. It concluded that the defendants had failed to "formulate minimum medical and constitutional standards for the operation of these institutions". The court scheduled a formal hearing to take evidence necessary to establish standards, and said that after the hearing it, the court, would itself "establish standards and in due course order their implementation".

The court postponed the hearings to give the defendants another opportunity to formulate proposed minimum standards. On January 17, 1972, the parties and *amici* met in Atlanta, Georgia, where they undertook extensive discussions concerning the proper standards of treatment at the Alabama hospitals. Out of these discussions came two Memoranda of Agreement stipulating certain of the standards necessary to define what would constitute minimally adequate mental treatment at a state psychiatric institution. One of the Memoranda covered standards for treatment at the mental hospitals, Searcy and Bryce; the other covered standards to be imposed at the school for the mentally retarded, Partlow. These Memoranda were filed with the district court at the times for the hearings set for determining the proper standards. The hearing concerning Bryce and Searcy was held February 3 and 4, 1972; the hearing concerning Partlow was held February 28–March 2.[4]

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[4]At the conclusion of the Partlow hearing, the district court entered an emergency order requiring the defendants to take certain immediate actions at Partlow. These included the installation of an emer-

The district court announced its orders granting permanent injunctive relief in two opinions issued April 13, 1972. One of the opinions concerned Partlow, the other, *Bryce and Searcy*. 344 F.Supp. 373 (Bryce-Searcy), 390 (Partlow). In Partlow Judge Johnson held that "[b]ecause the only constitutional justification for civilly committing a mental retardate . . . its habilitation, it follows ineluctably" that civilly committed retardates "have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society". The Bryce-Searcy opinion summarized the court's earlier opinions, noting its holding that the civilly mentally ill have a constitutional right to treatment. Beyond this, the two opinions were substantially identical. Both ordered the defendants (1) to implement an elaborate set of standards of treatment set forth in appendices to the opinions; (2) to establish human rights committees at the institutions to review all research and treatment programs "to ensure that the dignity and human rights of the residents are preserved"; (3) to prepare and file reports within six months of the orders on the implementation of the standards; and (4) to pay court costs and a reasonable attorneys' fee to the plaintiffs. The Partlow order

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gency light system and procedures for emergency evacuation; revision of sanitation measures in the kitchen; revamping of its program for the use of drugs; conducting appropriate immunizations; and employing three hundred additional resident care workers. In its order filed March 2, 1972, the court said it was taking these steps "to protect the lives and well-being of the residents", because it found Partlow to be a "warehousing institution . . . wholly incapable of furnishing treatment to the mentally retarded and . . . conducive only to the deterioration and debilitation of the residents", and because it found conditions at Partlow "substandard to the point of endangering the health and lives of the residents".

also required the defendants to hire a qualified administrator for the School within sixty days.[5]

Governor Wallace and the Mental Health Board filed separate notices of appeal May 12, 1972. On May 22, Governor Wallace filed a motion for modification and for a stay pending appeal. On June 1. the district court issued an opinion fixing the amount due plaintiffs as attorneys' fees at $36,744.62. 344 F.Supp. at 408–411. On June 26, the district court denied the motions for modification and for a stay pending appeal. This Court also denied a motion for a stay pending appeal.

B. *The conditions in the Alabama hospitals*

There has not been any significant dispute, in this Court or in the district court, about the conditions that prevailed in the Alabama hospitals at the time this suit was instituted. The defendants have pitched their defense on their argument that the Constitution does not guarantee a right to treatment; they have virtually conceded that if such a constitutional right exists, the conditions in the hospitals were such that the state's constitutional obligation to provide adequate treatment could not be met. There is therefore little reason for an extended discussion of the conditions that prevailed at the hospitals. Some discussion, how-

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[5]In both orders, the court refused requests made by plaintiffs and amici to appoint a master and professional advisory committee to oversee implementation of the standards on grounds that "[f]ederal courts are reluctant to assume control of any organization, but especially one operated by a state". 344 F.Supp. at 377, 392-393. The court also, in both orders, reserved ruling on various motions by the plaintiffs to ensure adequate financing for the implementation of the standards. These included a motion that the Mental Health Board be directed to sell or encumber its extensive land holdings, and a motion for an injunction against the expenditure of state funds on any "non-essential" functions until the standards were fully implemented.

ever, is essential to understanding this case. We therefore note briefly how far short the hospitals fell of meeting the three "fundamental conditions of adequate and effective treatment" defined by the district court.

First, it is clear that the environment at the hospitals was a far cry from the "humane psychological and physical environment" the district court envisioned as *sine qua non* of rehabilitative treatment. Bryce Hospital was built in the 1850's; it had 5000 inmates of whom 1500 to 1600 were geriatrics, 1000 were mental retardates, and there were allegedly other nonmentally ill persons. Patients in the hospitals were afforded virtually no privacy: the wards were overcrowded; there was no furniture where patients could keep clothing; there were no partitions between commodes in the bathrooms. There were severe health and safety problems: patients with open wounds and inadequately treated skin diseases were in imminent danger of infection because of the unsanitary conditions existing in the wards, such as permitting urine and feces to remain on the floor; there was evidence of insect infestation in the kitchen and dining areas. Malnutrition was a problem: the United States described the food as "com[ing] closer to 'punishment' by starvation" than nutrition. At Bryce, the food distribution and preparation systems were unsanitary, and less than 50 cents per day per patient was spent on food. Dr. Donald L. Clopper, Associate Commissioner for Mental Retardation for the Alabama Department of Mental Health, testified that Partlow was a "stepchild" in the State of Alabama; that the physical environment was inadequate for treating inmates; that "we don't have the staff we don't have the facilities, nor do we have the financial resources." According to Dr. Clopper, at least 300 Partlow inmates could

be discharged immediately, and about 70 percent of the inmates should never have been committed; yet it was 60 percent over-crowded. Patients at Partlow were forced to perform uncompensated labor. Aides frequently put patients in seclusion or under physical restraints, including straitjackets, without physicians' orders. One resident had been regularly confined in a straitjacket for more than nine years. The Evaluation Report on Partlow by the American Association on Mental Deficiency stated that nine working residents would feed 54 young boys ground food from one very large bowl with nine plates and nine spoons; "since there were no accommodations to even sit down to eat," it was impossible to tell which residents had been fed and which had not been fed with this system. Seclusion rooms were large enough for one bed and a coffee can, which served as a toilet. The patients suffered brutality, both at the hands of the aides and at the hands of their fellow patients; testimony established that four Partlow residents died due to understaffing, lack of supervision, and brutality.[6]

The hospitals failed to meet the second condition, adequate staffing. The defendants' chief witness on standards maintained that treatment could be delivered with the ratio of one psychiatrist, one graduate level psychologist, and one masters level social worker for every 125 patients, and the district court ultimately adopted this recommendation. The organizations appearing as amici had recommended higher ratios — one psychiatrist, one

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[6]One of the four died after a garden hose had been inserted into his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth; and a fourth died from a self-administered overdose of drugs which had been inadequately secured.

psychologist, and one social worker for every 30–50 patients. But at the time this suit was instituted there were ratios of only one medical doctor with some psychiatric training for 5,000 patients, one Ph.D. psychologist for every 1,670 patients, and one masters level social worker for every 2,500 patients at Bryce. The parties and amici agree completely on the minimums necessary for treatment of the mentally retarded. They agreed that adequate treatment could be delivered at Partlow with ratios of one masters level psychologist and one masters level social worker for every sixty patients, and one physician for every two hundred patients. Yet at Partlow there were only one psychologist with masters level training or above for every 1,200 patients; one masters level social worker for every 730 patients; and one physician for every 550 patients. Of the four physicians at Partlow, two were not licensed to practice in Alabama.

A severe shortage of nonprofessional staff paralled the inadequacies of professional staff. After a tour of Bryce, defendants' own consultants noted that:

> Aide staff is spread very thin, creating extreme stresses for individual aides, who at times must cover one or two or three wards, housing as many as 100 or 200 patients. Obviously, it is impossible under such circumstances to provide anything more than a cursory observation and the hope of avoiding disturbing incidents. An aide under these circumstances is hard pressed to meet even minimum patient needs.

The institutional staff was inadequate not only in sheer numbers but also in training; there was no effective "in-service training" program for, or even any regular supervision over, the non-professionals.

Finally, the evidence established that the hospitals

failed to meet the third condition, individualized treatment programs. According to one consultant's testimony, care of patients at Partlow was not suited to the needs of particular individuals, but was instead "geared primarily to housekeeping functions — cleaning floors, cleaning beds, cleaning patients — and to a continuation of work assignments". Experts testified that the patient records kept at the hospital were wholly inadequate; that they were written in such a way as to be incomprehensible to the aide level staff that had prime responsibility for patient care; and that they were kept where they were not accessible to the direct care staff particularly in need of them.

II.

[1, 2] The appellants' first and principal contention on appeal is that the Constitution does not guarantee persons civilly committed to state mental institutions a right to treatment.[7] This contention is largely foreclosed by our

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[7]In raising the issue in this Court, the appellants contend that, because there is no constitutional right to treatment, the district court lacked jurisdiction over the suit. In so arguing the issue, the appellants are following, on this point as one the other four of their first five contentions, the decision of the Northern District of Georgia in Burnham v. Department of Public Health, 1972, 349 F.Supp. 1335, appealed docketed, No. 72-3110, 5 Cir., Oct. 4, 1972. In *Burnham*, the court held that the Constitution does not guarantee a right to treatment. It then held that the consequence of this conclusion was that it was without jurisdiction over the suit, because 28 U.S.C. § 1343(3), the asserted basis of jurisdiction, confers jurisdiction only over "action[s] . . . to redress the deprivation" of a "right, privilege, or immunity" secured by the Constitution or by an Act of Congress providing for equal rights.

Whatever the merits of the question whether the Constitution guarantees a right to treatment, it is clear that it is not proper to treat the question as one affecting the jurisdiction of the district court. It is settled that where the asserted basis of jurisdiction is 28 U.S.C. § 1331(a), which provides jurisdiction over actions "aris[ing]

decision, issued since the institution of this appeal, in Donaldson v. O'Connor, 1974, 493 F.2d 507. In *Donaldson,* we held that civilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition. We reasoned that the only permissible justifications for civil commitment, and for the massive abridgements of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or to others, or the individual's need for treatment and care. We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to sell or to others, then treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of individuals' liberty.

Our discussion in *Donaldson,* briefly summarized here, answers most of the arguments made by the appellants on this appeal against the recognition of a constitutional right to treatment. Governor Wallace, however, makes one argument not answered by our discussion in *Donaldson,*

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under the Constitution, laws, or treaties of the United States". "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action". Bell v. Hood, 1946, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939. Rather, jurisdiction must be sustained if "the right . . . to recover . . . will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another". *Id.,* 327 U.S. at 685, 66 S.Ct. at 777. The only exceptions obtain "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous". *Id.,* 327 U.S. a 682-683, 66 S.Ct. at 776. There is no reason why the situation should be any different when the asserted basis of jurisdiction is § 1343(3).

and it is appropriate that we address that argument here. Governor Wallace challenged the assumption, made by the district court in this case and by this Court in *Donaldson*, that the only permissible justifications for confinement are danger to self or others or need for treatment. instead, the Governor suggests, the principal justification for commitment lies in the inability of the mentally ill and mentally retarded to care for themselves. The essence of this argument is that the primary function of civil commitment is to relieve the burden imposed upon the families and friends of the mentally disabled. The families and friends of the disabled, the Governor asserts, are the "true clients" of the institutionalization system.[8]

From this premise the Governor proceeds to the conclusion that is the crux of his argument. If "need for care" is a justification for commitment — or is *the* justification — then it follows that the mere provision of custodial care is constitutionally adequate to justify continued confinement. "[T]he providing of custodial care alone is a tremendously important consideration to patients, their families, and the public-at-large", the Governor writes in his brief.

There are two answers to this line of argument. The

[8] Governor Wallace borrows the term "true clients" from the work of Professor Hugh Goffman. H. Goffman, Asylums—Essays on the Social Situations of Mental Patients and Other Inmates 384 (1961). Governor Wallace in his brief praises Professor Goffman as a "realistic writer". Be that as it may, it is fairly clear that Professor Goffman's intent, in calling "relatives, police, and judges" the "true clients of the mental hospitals" was critical, indeed harshly so, and that Professor Goffman was insinuating by the statement an embarrassing, though rarely admitted, truth about the institutionalization system in the United States. What Professor Goffman implied was morally unacceptable — that the convenience of relatives and law enforcers justifies stripping away all of the liberties of the civilly committed — we hold today is constitutionally unacceptable.

first, and more limited, is that even accepting the Governor's premise that "need for care" is a constitutionally adequate justification for confinement, it does not follow that we must accept the conclusion — that *the kind of care that was provided at the Alabama hospitals* is sufficient to make continued confinement constitutional. The assertion that "need for care" justifies confinement implies that the state has an affirmative obligation to provide a certain minimum quality "care", no less than the assertion that "need for treatment" justifies confinement implies that the state has an affirmative obligation to provide a certain minimum quality "treatment". And it is clear that, however that obligation might specifically be defined, it was not being met in the Alabama hospitals. Dr. Gunnar Dybwad, Professor of Human Development at the Graduate School for Advanced Studies in Social Welfare at Brandeis University, and a one time presidential consultant in the field of mental retardation, made essentially this point when he testified about conditions at Alabama's Partlow State School and Hospital:

> The situation which exists and obviously has existed in Partlow for a long time is one of storage, of persons. I am using that word because *I would not use care,* which involves — has a certain qualitative character, and *I would not even use the word, 'custodial,' because custody, in my term, means safekeeping.* And, as is visible to the visitor at the present time, employees at Partlow are *not in a position to effect safekeeping,* considering the number of people they have to take care of; so I would say it is a storage problem at the moment. (Emphasis supplied.)

Indeed, many of the standards established by the district court in this case — notably those required for what the district court called a "humane psychological and

physical environment" — might have to be met for the state to be able legitimately to claim it was providing adequate "care" to its mental patients. At least where the right to a "humane environment" is concerned, then it is irrelevant whether the right be viewed as a facet of a "right to treatment", or of a "right to care". It is likewise irrelevant for those purposes whether the state interest imputed to the civil commitment system be called the need "to treat" the mentally ill, or the need "to care" for them.

[3] But beyond this, we find it impossible to accept the Governor's underlying premise that the "need to care" for the mentally ill — and to relieve their families, friends, or guardians of the burdens of doing so — can supply a constitutional justification for civil commitment. At stake in the civil commitment context, as we emphasized in *Donaldson*, see 493 F.2d at 520, are "massive curtailments" of individual liberty. Against the sweeping personal interests involved, Governor Wallace would have us weigh the state's interest, and the interests of the friends and families of the mentally handicapped in having private parties relieved of the "burden" of caring for the mentally ill. The state interest thus asserted may be, strictly speaking, a "rational" state interest. But we find it so trivial beside the major personal interests against which it is to be weighed that we cannot possibly accept it as a justification for the deprivations of liberty involved.

The other arguments against recognition of a constitutional right to treatment for civilly committed mental patients advanced by the appellants are, as we noted above, answered by our discussion in *Donaldson*. Following *Donaldson*, we hold that the district court here did not err in finding that civilly committed mental patients have a constitutional right to treatment. Our express hold-

ing in *Donaldson* and here rests on the *quid pro quo* concept of "rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary." 493 F.2d at 522.

III.

[4] The second, third, fourth, and fifth issues raised by the appellants are also substantially affected by our decision in *Donaldson*, and present little difficulty except as to some aspects of remedy which will be discussed in Part IV, infra. The argument that this suit is barred by the eleventh amendment is based largely upon Burnham v. Department of Public Health, N.D.Ga.1972, 349 F.Supp. 1335, appeal docketed, No. 72–3110, 5 Cir., Oct. 4, 1972, a case consolidated for argument on appeal with this case. In *Burnham* the court held that, because the right to treatment was a right arising only, if at all, under state law, a suit by citizens of the state against state officials to enforce the right was barred by the eleventh amendment. Our holding in *Donaldson*, however, vitiates this argument, of course, for we have now established that the right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment.

[5] In *Donaldson*, we addressed and rejected the argument that a constitutional right to adequate treatment would present questions not susceptible to "judicially manageable or ascertainable standards". We held that the judiciary was competent to determine, at least in individual cases, whether psychiatric treatment was medically or constitutionally adequate. And we said in dictum that even in cases such as this one, "when courts are asked to

undertake the more difficult task of fashioning institution-wide standards of adequacy", 493 F.2d at 526, the courts would be able to formulate workable standards. In *Donaldson*, we took note of the substantial agreement reached in this case among parties and *amici* in developing standards during the course of the proceedings in the lower court. We cited that development as evidence supporting our view that workable standards could be fashioned. We remain mindful of that development here, in reaffirming our belief that the right to treatment can be implemented through judicially manageable standards.

[6] The appellants' fourth contention is that the order of the district court invades a province of decision-making exclusively reserved for the state legislature. Governor Wallace argues that the order will require heavy expenditures of state funds; that these funds will have to come from other state programs; and that the duty of compromising and allocating funds among the many programs competing for them is a duty which must be discharged by the state governor and legislature alone. Governor Wallace concedes in his brief that he is not contending that "the financial cost of complying with an established constitutional right is a valid reason for failure to comply". He "suggest[s] that before the Court decides to adopt a new constitutional right it should consider all of the consequences of its action, financial and social, and its effect on our federal form of government". The Mental Health Board makes the point in a related way, by suggesting that the district court's order here is in effect an order requiring the state to furnish a particular service, and by citing cases establishing the general proposition that ordinarily it is not for the federal courts to say whether or in what amounts a state shall provide any particular govern-

ment benefit or service. *E. g.*, Fullington v. Shea, D.Colo. 1970, 320 F.Supp. 500, aff'd, 404 U.S. 963, 92 S.Ct. 345, 30 L.Ed.2d 282.

We find these arguments unpersuasive. It goes without saying that state legislatures are ordinarly free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights. And it is the essence of our holding, here and in *Donaldson*, that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone. "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations". Jackson v. Bishop, 8 Cir. 1968, 404 F.2d 571, 580 (Blackmun, J.), quoted, Rozecki v. Gaughan, 1 Cir. 1972, 459 F.2d 6, 8. "Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights". Hamilton v. Love, E.D.Ark.1972, 328 F.Supp. 1182, 1194. "[T]he obligation of the Respondents [prison officials] to eliminate unconstitutionalities does not depend upon what the Legislatures may do". Holt v. Sarver, E.D.Ark.1970, 309 F. Supp. 362, 385, aff'd, 8 Cir. 1971, 442 F.2d 304. See also Hawkins v. Town of Shaw, 5 Cir. 1971, 437 F.2d 1286, 1292.

This conclusion is not novel. In the context of state penal institutions, the federal courts have repeatedly intervened to assure that the conditions of confinement do

not invade the constitutional rights of those confined. *E. g.*, Cruz v. Beto, 1972, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263; Johnson v. Avery, 1968, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718; Campbell v. Beto, 5 Cir. 1972, 460 F.2d 765; Landman v. Royster, E.D.Va.1971, 333 F.Supp. 621; Holt v. Sarver, E.D.Ark.1970, 309 F.Supp. 362, aff'd, 8 Cir. 1971, 442 F.2d 304. This Court has recognized that "our constitutional duties require that the courts be ever vigilant to assure that the conditions of incarceration do not overstep the bounds of federal constitutional limitations". *Campbell*, 460 F.2d at 767–768. In discharging these duties, the federal courts have in some cases entered decrees requiring substantial restructuring of state prison systems, but the courts have not hesitated to enter such decrees when necessary to safeguard the constitutional rights of prisoners. As the court said in Holt v. Sarver:

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

309 F.Supp. at 385.

Similar developments have occurred in the field of institutions for the detention of juveniles. Nelson v. Heyne, 7 Cir. 1974, 491 F.2d 352, aff'g, N.D.Ind. 1972, 355 F.Supp. 451; Martarella v. Kelley, S.D.N.Y.1972, 359 F.Supp. 479, enforcing, 349 F.Supp. 575; Inmates of Boys' Training School v. Affleck, D.R.I.1972, 346 F.

Supp. 1354; Morales v. Turman, E.D.Tex.1973, 364 F.Supp. 166.

[7] The appellants' fifth contention, that the plaintiffs had adequate remedies at law, is also unpersuasive. In the *Burnham* case, the court held that the legal remedies of "habeas corpus, medical malpractice, and ordinary tort actions" would supply adequate remedies to mental patients who claimed to have been denied a right to treatment. 349 F.Supp. at 1343. It found the plaintiffs' arguments to the contrary "inconsistent with plaintiffs argument that each individual patient should have his particular therapy or treatment personalized". *Id.* Governor Wallace and the Mental Health Board urge here the argument that damage and habeas corpus actions provide adequate legal remedies to the plaintiffs. They also point to the plaintiffs' argument that treatment must be individualized, and to the tension between that argument and the plaintiffs' insistence that injunctive relief on behalf of the plaintiff class is appropriate in this case.

We are unable to agree that injunctive relief is inappropriate merely because damages or habeas corpus relief may be available to some or all individual plaintiffs. While habeas corpus and tort remedies should play a valuable, indeed essential, role in enforcing the constitutional rights we recognized in *Donaldson*, those remedies are not capable of ensuring what the plaintiffs seek to ensure in this case. In the first place, habeas corpus relief and tort damages are available only after the fact of a failure to provide individual treatment. Here the plaintiffs seek preventive relief, to assure in advance that mental patients will at least have the *chance* to receive adequate treatment by proscribing the maintenance of conditions that foredoom *all* mental patients *inevitably* to inadequate

mental treatment. Moreover, there are special reasons why reliance upon individual suits by mental patients would be especially inappropriate. Mental patients are particularly unlikely to be aware of their legal rights. They are likely to have especially limited access to legal assistance. Individual suits may be protracted and expensive, and individual mental patients may therefore be deterred from bringing them. And individual suits may produce distortive therapeutic effects within an institution, since a staff may tend to give especially good — or especially harsh — treatment to patients the staff expects or knows to be litigious.[9]

We see no inconsistency between this conclusion and the position taken by the plaintiffs, and by the district court, that treatment must be individualized. The plaintiffs here do not seek to *guarantee* that all patients will receive all the treatment they need or that may be appropriate to them. They seek only to ensure that conditions in the state institutions will be such that the patients confined there will have a *chance* to receive adequate treatment. This requires only the establishment of a program, institution-wide in scope, for developing and formulating individual treatment plans; it of course does not require the formulation, in this suit, of each individual plan. The question of what is necessary to the establishment of such a program is better resolved in a class action brought on behalf of all patients than it would be in a series of individual suits.

IV.

We pretermit decision as to the remedy decreed by the district court to the extent herein stated. As we have held,

[9]See 86 Harv.L.Rev. 1282, 1305 (1973).

the legislative power may not be used to deprive appellees of their constitutional right to treatment, but a substantial question is presented as to the scope of judicial power in implementing this right. The ultimate question will be, if all else fails, the method of effecting the financial outlay which will be necessary for the judiciary to give meaning to judicially prescribed minimum constitutional standards for adequate treatment of the mentally ill.

Prior to the entry of the court's orders on April 13, 1972, 344 F.Supp. 373; 344 F.Supp. 387, the parties and amici stipulated to a number of specific conditions they agreed were necessary for a constitutionally acceptable minimum treatment program.[10] Because of these stipulations, we need not and do not reach decision as to whether the standards prescribed by the district court are constitutionally minimum requirements, or whether it is within the province of a federal district court, three-judge or single judge, to prescribe standards as distinguished from enjoining the operation of such institutions while constitutional rights are being violated.

[8] Governor Wallace contends such stipulations are not binding on him or the Alabama legislature. As a party to the stipulations, through counsel, we hold the Governor has for his part agreed that these standards are minimally acceptable under the Constitution. The Alabama legisla-

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[10]The parties and amici submitted in two Memoranda of Agreement stipulations of standards of adequate care. Virtually all of the specifics of the district court's April 13, 1972 orders were taken from these stipulations. These standards have not been challenged on appeal. Indeed, Governor Wallace's brief to this court begins with the affirmation: "We wish to emphasize at the outset that this appellant, Governor George C. Wallace, is in full and complete agreement with the ultimate achievement of the standards and goals for mental health facilities which are set forth in the District Court's order[s] of April 13, 1972." Brief of Appellant, p. 1.

ture presents a different problem. Clearly the Governor is without authority to agree to the expenditure of funds required to implement such a broad spectrum of standards when such a decision under Alabama law is reserved to the legislature. That the legislature was not a party to the stipulations in question or to this law suit reenforces this manifest principle of governmental organization. It is the Governor's role to propose relief to the legislature and, having stipulated the standards, to use his best efforts to accomplish the relief.

With respect to judicial accomplishment of the remedy, profound questions are presented regarding the scope of substantive due process and the role of federal courts in matters affecting the management of state institutions. Here we are concerned with the operation of state mental institutions within the parameters of substantive due process.[11]

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[11]As noted, supra, however rare they may be, federal decrees mandating affirmative action expenditures by state governing authorities to ensure constitutional guarantees are not unprecedented in cases involving equal protection and also cruel and unusual punishment. *E.g.*, Griffin v. County School Bd., 1964, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed.2d 256, 266; Swann v. Charlotte-Macklenburg Bd. of Educ., N.D.N.C., 1970, 311 F.Supp. 265, 268, vacated and remanded on other grounds, 4 Cir. (en banc), 431 F.2d 138, order reinstated, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554; United States v. Plaquemines Parish School Bd., E.D.La., 1967, 291 F. Supp. 841, aff'd as modified, 5 Cir., 1969, 415 F.2d 817; Cruz v. Beto, 1972, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263; Holt v. Sarver, 8 Cir., 1971, 442 F.2d 304; Nelson v. Heyne, 7 Cir., 1974, 491 F.2d 352; Gautreaux v. Chicago Housing Auth., N.D.Ill.1969, 296 F.Supp. 907, aff'd, 7 Cir., 1970, 436 F.2d 306, cert. denied, 1971, 402 U.S. 922, 91 S.Ct. 1378, 28 L.Ed.2d 661.

See also cases cited Note, Right to Treatment, 1973, 86 Harv.L. Rev. 1282, 1300, nn. 98-104; Developments in the Law, Civil Commitment of the Mentally Ill, 1974, 87 Harv.L.Rev. 1190, 1398, n. 6; Comment, Enforcement of Judicial Financing Order; Constitutional Rights in Search of a Remedy, 1970, 59 Geo.L.J. 393.

[9] The Governor argues that the prescribed remedy will entail the expenditure annually of a sum equal to sixty per cent of the state budget excluding school financing, and a capital improvements outlay of $75,000,000. This is contested by appellees. However that may be, we regard as premature any issue as to whether the district court should appoint a Special Master for the purposes of selling or encumbering state lands to finance these standards, or should enjoin certain state officials from authorizing expenditures for nonessential state functions, and thereby alter the state budget, or by other means order a particular mode of financing the implementation of the stipulated standards.

Such remedial propositions are by the terms of the district court's April 13, 1972 not present orders; they lie in the uncertain future. The district court wrote:

> ". . . this Court has decided to reserve ruling also upon plaintiffs' motion that defendant Mental Health Board be directed to sell or encumber portions of its land holdings in order to raise funds. Similarly, this Court will reserve ruling on plaintiffs' motion seeking an injunction against the treasurer and the comptroller of the State authorizing expenditures for nonessential State functions, and on other aspects of plaintiffs' requested relief designed to ameliorate the financial problems incident to the implementation of this order. . . . The responsibility for appropriate funding ultimately must fall, of course, upon the State Legislature and, to a lesser degree, upon the defendant Mental Health Board of Alabama. For the present time, the Court will defer to those bodies in hopes that they will proceed with the realization and understanding that what is involved in this case is not representative of ordinary governmental functions such as paving roads and maintain-

> ing buildings. Rather, what is so inextricably intertwined with how the Legislature and Mental Health Board respond to the revelations of this litigation is the very preservation of human life and dignity . . .
>
> In the event, though, that the Legislature fails to satisfy its well-defined constitutional obligation, and the Mental Health Board, because of lack of funding or any other legally insufficient reason, fails to implement fully the standards herein ordered, it will be necessary for the Court to take affirmative steps, including appointing a master, to ensure that proper funding is realized and that adequate treatment is available for the mentally ill in Alabama." 344 F.Supp. at 377–378. See also 344 F.Supp. at 393–394. (These separate orders cover the three institutions involved.)

To the latter statement, the district court added in a footnote, 344 F.Supp. at 378, n. 8:

> "The Court understands and appreciates that the Legislature is not due back in regular session until May, 1973. Nevertheless, special sessions of the Legislature are frequent occurrences in Alabama, and there has never been a time when such a session was more urgently required. If the Legislature does not act promptly to appropriate the necessary funding for mental health, the Court will be compelled to grant plaintiffs' motion to add various State officials and agencies as additional parties to this litigation, and to utilize other avenues of fund raising." See also 344 F. Supp. at 394, n. 14.

The district court ordered that defendants file within six months a detailed report on the implementation of the stipulated standards.

The serious constitutional questions presented by federal judicial action ordering the sale of state lands, or

altering the state budget, or which may otherwise arise in the problem of financing, in the event the governing authorities fail to move in good faith to ensure what all parties agree are minimal requirements, should not be adjudicated unnecessarily and prematurely. *See* Ashwander v. Tennessee Valley Authority, 1936, 297 U.S. 288, 346–348, 56 S.Ct. 466, 80 L.Ed. 688, 710–712 (Brandeis, J., concurring); *cf.* Hawkins v. Town of Shaw, 5 Cir. (en banc), 1972, 461 F.2d 1171; Holt v. Sarver, 8 Cir., 1971, 442 F.2d 304, 309. Since we have now affirmed that part of the district court's orders recognizing the constitutional right to treatment, determination of good faith efforts by state authorities to ensure these rights should be made in the first instance in the district court.

[10] In any event, as a jurisdictional matter dictated by federal statute, remedies of the type contemplated in the district court order of April 13, 1972 are required to be determined by a district court of three judges. Any federal decree that state lands be sold or legislative appropriations be reallocated or enjoined would involve state laws of statewide significance within the purview of 28 U.S.C.A. § 2281. The federal injunctive decree which might be entered in such circumstances is required to be that of a three-judge district court. Sands v. Wainwright, *supra,* 491 F.2d 417. We of course make no prejudgment as to the appropriateness of any such remedial order. Moreover depending on the improvements made or in progress, such remedies may be unnecessary.

This court views as serious a state's failure to ensure the fulfillment of appellees' constitutional rights, but the interests of all concerned, and the sensitivities of our federal system, will be best served by the parties, amici,

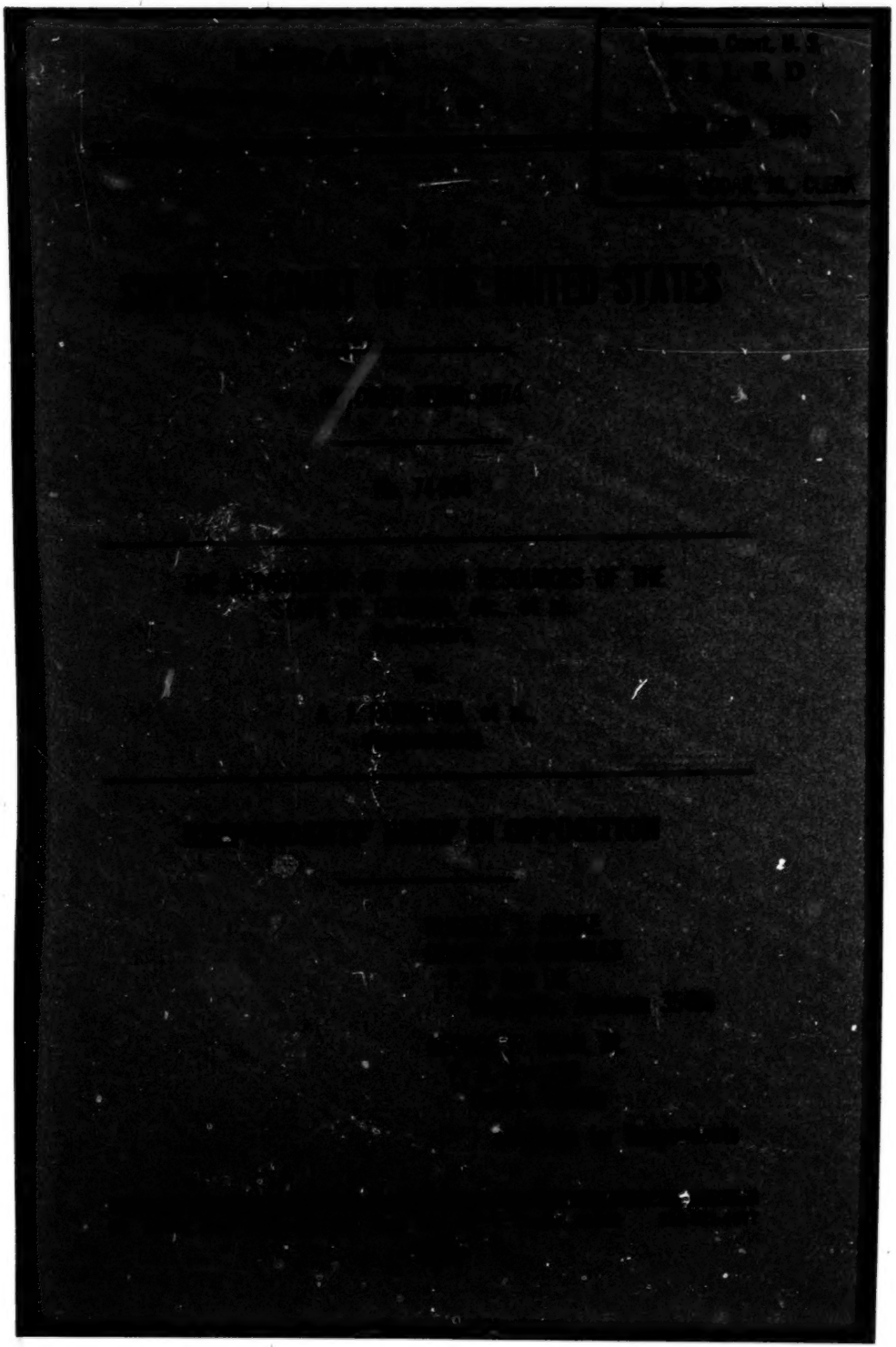
and court moving together to meet the constitutional requisites. This is the nature of the remedy ordered by this court in Hawkins v. Town of Shaw, *supra*, 461 F.2d at 1174. This appears to be the meaning and intent of the district court's recognition of the function of the Alabama legislature within the Alabama governmental framework, and the court's orders of April 13, 1972 requiring reports on compliance with the stipulated standards.

This approach should hasten the day when the district court can be reasonably assured that appellees' constitutional rights are no longer being violated, and when ultimate control over the institutions in question can be returned to the state. *Cf.* Holt v. Sarver, *supra*, 442 F.2d at 309.

V.

We reserve decision on the issue presented by the awards of attorneys' fees to plaintiffs pending decision in No. 73–1790, Gates v. Collier; No. 73–2033, Newman v. State of Alabama; and Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, en banc, argued and submitted on October 2, 1974. See 28 U.S.C.A. § 2106 for the authority to reserve decision.

Affirmed in part; remanded in part for further proceedings not inconsistent herewith; and decision reserved in part.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-904

THE DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF GEORGIA, etc., et al.,
Petitioners,

vs.

A. J. BURNHAM, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Plaintiffs-Respondents A. J. Burnham *et al.*, by their attorneys, oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported as *Burnham v. The Department of Public Health of the State of Georgia*, 349 F.Supp. 1335

(N.D. Ga. 1972) (henceforth "the district court opinion"). The *per curiam* opinion of the Court of Appeals for the Fifth Circuit (henceforth the "Court of Appeals decision") is reported at 503 F.2d 1319 (5th Cir. 1974) and is attached as a part of the Appendix to Petitioner's petition for certiorari (henceforth cited as Pet. App.). Also included in Pet. App. is the opinion of the Fifth Circuit in *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 18A) was entered on November 8, 1974. Petitioners' petition was filed, and the case was docketed, in this Court on January 22, 1975. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The district court opinion (Pet. App. 1A), relying solely on the pleadings, granted Defendants-Petitioners' motion to dismiss prior to any evidentiary hearing. The absence of any record raises the question of whether this Court should attempt to resolve complex constitutional issues without any factual background against which to formulate the dimensions of the "right to treatment," and without any indication that the prerequisites of Rule 19 have been satisfied.

2. The instant case was consolidated in the Court of Appeals with *Wyatt v. Aderholt* (Pet. App. 19a); to some extent the Circuit Court's *per curiam* decision below was arrived at in light of the voluminous record before that court in *Wyatt*. Additionally this Court has granted certiorari in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1972) *cert. granted*, — U.S. —, 42 L.Ed.2d 138 (October 21, 1974); *argument reported* 43 U.S.L.W. 3397. Accordingly the question is presented of

whether the Court of Appeals decision should be affirmed or whether alternatively the requested writ of certiorari should be denied in that: (A) the Circuit Court's decision was correct and (B) this Court will answer the question sought to be reviewed herein in the *Donaldson* case.

STATEMENT OF THE CASE AND PROCEEDINGS IN THE COURTS BELOW

Petitioners' petition for certiorari argues their case and fails to report succinctly the progression of the case to this Court.

On March 29, 1972 Plaintiffs-Respondents filed this class action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 in the United States District Court for the Northern District of Georgia. The complaint was brought on behalf of the patients confined to Georgia's various mental health hospitals; it alleged that each named institution "is providing constitutionally inadequate diagnosis, care and treatment of the patients confined there." (A 7):[1] Each institution was charged with the following deficiencies: "(1) The failure to provide a humane psychological and physical environment; (2) Failure to provide a qualified staff in numbers sufficient to administer adequate treatment; and (3) Failure to provide individualized treatment plans for each patient." (A 7). The complaint further noted that in "a large number of cases" the care and treatment provided amounted only to "custodial care." (A 7).

In the prayer for relief Plaintiffs-Appellants requested the district court to declare that the patients confined to the specified institutions "are constitutionally entitled" to adequate treatment. (A 8).

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[1] The record printed as the Appendix has not been filed in this Court. For purposes of citations to the record Respondents will refer to the printed Appendix before the Court of Appeals as "A", followed by the applicable page number.

On April 21, 1972 the Defendants filed a pleading entitled "Defenses and Answer" which served both as a motion to dismiss and an answer.

On August 3, 1972, prior to an evidentiary hearing, the district court entered its order granting Defendants' motion to dismiss and dismissing Plaintiffs' complaint. Thereafter an appeal was perfected to the Court of Appeals for the Fifth Circuit.

On November 8, 1974, the Court of Appeals in a *per curiam* opinion reversed the district court's decision, in light of its earlier decisions in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), and *Wyatt v. Aderholt* (Pet. App. 19a). Thereafter Petitioners filed their petition for certiorari in this Court to review the decision of the Court of Appeals.

REASONS WHY WRIT SHOULD BE DENIED

I. There Is No Suggestion, and Indeed No Indication, That the Prerequisites of Rule 19 are Satisfied by This Case.

Rule 19 provides that this Court may review by certiorari, decisions of lower courts in cases where there is a conflict in decisions of circuit courts of appeal and/or when a substantial or important, federal question is presented. The relevant portions of the rule provide that certiorari may be granted: "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . . or has decided an important question of federal law which has not been, but should be, settled by this court." Rule 19(b) *Supreme Court Rules* (1970).

A. Decisions by other courts—no conflict among the circuits.

In the instant case there is no conflict between decisions of courts of appeal. This case presents, on the present state of

the record, the bare question of whether persons involuntarily, civilly committed to state mental institutions are constitutionally entitled to adequate treatment. The Court is not called upon to decide the scope of relief which a district court could appropriately grant to a class of patients who seek to enforce and protect their "right to treatment." Turning as it does on complex factual questions, the "remedies question" of "right to treatment" cases would best be decided within the context of cases (e.g., *Wyatt v. Aderholt, supra*) where factual support for the remedies granted exists. Accordingly, this case concentrates on the narrow "right to treatment" issue.

There is unanimity among both state and federal courts that persons involuntarily committed to state mental institutions have a constitutional right to treatment. See, e.g., *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971), and 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974); *Walsh v. Likins*, 373 F.Supp. 487 (D. Minn. 1974); *Davis v. Watkins*, No. C73205 slip op. at 12 (N.D. Ohio, Sept. 1974); *In Re Ballay*, 482 F.2d 648, 659 (D.C. Cir. 1973); *Kesselbrenner v. Anonymous*, 33 N.Y. 2d 161, 305 N.E. 2d 903 (1973).

There also exists wide precedent holding that there is a right to treatment for persons committed for care and treatment under "non-penal" statutes. See, eg., *Nelson v. Heyne*, 355 F.Supp. 451, 459 (N.D. Ind. 1972), *aff'd* 491 F.2d 352, 360 (7th Cir. 1974), *cert. denied* — U.S. — (1974), with regard to "juvenile delinquents"; *Martarella v. Kelly*, 349 F.Supp. 575, 585, 598-600 (S.D. N.Y. 1972), *enforced* 359 F.Supp. 478 (S.D. N.Y. 1973), with regard to "persons in need of supervision"; *Davy v. Sullivan*, 354 F.Supp. 1320, 1328-1329 (M.D. Ala. 1973) (three judge court), with regard to "sexual psychopaths"; and, *United States v. Walker*, 335 F.Supp. 705, 708 (N.D. Cal. 1971), with regard to "persons incompetent to stand trial."

The "right to treatment" has been expressly rejected by only one court, the district court in the instant case. *Burnham v. Dept. of Pub. Health*, 349 F.Supp. 1335 (N.D. Ga. 1972), *reversed and remanded*, 503 F.2d 1319 (5th Cir. 1974). Petitioners cite *New York State Association for Retarded Children v. Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973), as a rejection of the "right to treatment." (Petition pp. 17-18, n. 11.) Actually the district court in *Rockefeller, supra*, struggled for a definition of a "right" viewed by that court as very broad. The court settled on the phrase, "the right to be free from harm"; the court, having defined the "right" then granted sweeping relief akin to that granted in *Wyatt v. Stickney*, 344 F.Supp. 387, 390 (M.D. Ala. 1972). Accordingly, the *Rockefeller* decision is important more for the remedy granted than for the conceptual route by which the result was reached. Moreover, Respondents are advised that the district court in *Rockefeller* has reserved decision on the "right to treatment" issue pending the presentation of additional evidence and briefs. *Rockefeller, supra*, No. 72-Civ. 356, 357, Order of May 23, 1974, at 2.

Petitioners cite other decisions to indicate rejection of the "right to treatment." Petition, pp. 17-20, citing *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); and *People of New York ex rel. Anonymous v. LaBurt*, 218 N.Y.S. 738 (1961), *cert. denied* 369 U.S. 428 (1962). Both *Covington, supra* and *Lake, supra*, may not be read as rejections of the constitutional "right to treatment." *Covington* followed the lead of *Rouse* that the denial of treatment in public mental institutions raised constitutional questions. *Id.* at 625. *Rouse, supra*, was decided on statutory grounds but by way of dictum intimated that a constitutional basis for "the right" existed and thus became the judicial progenitor of "the right to treatment" litigation. To the extent that *Lake, Covington* and *Rouse* created uncertainties with respect to the District of Columbia Court of Appeals' position on this

issue, all doubt has now been resolved in favor of "the right." *In Re Ballay*, 482 F.2d 648, 659 (D.C. Cir. 1973). *LaBurt, supra*, was decided without a hearing nearly 15 years ago.

That a right to treatment exists for state-confined mental patients has been supported by legal commentators.[2] professional organizations[3] and the United States government.[4]

While the State of Georgia may not be "an ogre" (Petition p. 8), it is certainly out of step with the prevailing case law and commentaries in its efforts to gain reversal of the Court of

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[2] More than 30 law review articles, supporting the right to treatment have been published. Representative articles are: Birnbaum, "The Right to Treatment," 46 A.B.A.J. 499 (1960); Comment, "Development in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. 1190 (1974); Robitscher, "Right to Psychiatric Treatment: A Social-Legal Approach to the Plight of the State Hospital Patient," 18 Vill. L. Rev. 11 (1972); Note, "The Nascent Right to Treatment," 53 Va. L. Rev. 1134 (1967). Drake, "Enforcing the Right to Treatment," 10 Am. Crim. L. Rev. 587 (1972).

[3] *Amici curiae* briefs supporting the right to treatment have been filed with this Court in *Donaldson v. O'Connor, supra*, by the American Psychological Association, the American Psychiatric Association, the American Orthopsychiatric Association and the National Association for Mental Health. Petitioner cites an early position statement of the American Psychiatric Association critical of the right to treatment. Petition, pp. 33-34, N. 16 citing "Position Statement on the Question of Adequacy of Treatment," 123 Am. Journ. Psychiatry, 1458 (1967). The position of the A.P.A. has changed so as to provide "explicit support" for the right. See, American Psychiatric Association Task Force on the Right to Treatment, Draft Position Paper on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded (4th Draft, Oct. 1974).

[4] The United States has participated at all levels as *Amicus curiae* in *Wyatt v. Stickney, supra*. Additionally the United States Justice Department has participated either as a party or *amicus curiae* in other cases seeking to establish and enforce the right to treatment as a right of constitutional dimension. See, *United States v. Soloman*, civ. act. No. 74-181 (D. Md. filed Feb. 21, 1974); *New York Ass'n for Retarded Children v. Rockefeller, supra*. Finally Respondents are advised that the United States Solicitor General has written to this Court indicating support for "the right" in connection with this Court's review of *Donaldson v. O'Connor, supra*.

Appeals for the Fifth Circuit. Indeed the State of Alabama has not appealed the decision rendered in *Wyatt v. Aderholt, supra.*

B. **The substantial or important federal question.**

Any argument concerning the existence of a constitutional right to treatment unquestionably presents a substantial, important federal question. However, the subtle underpinnings of the constitutional issues demand a full, factual record to define the parameters of the right. In *Jackson v. Indiana,* 406 U.S. 715, 738 (1972), this court held that the due process clause of the Fourteenth Amendment requires that the "nature" of confinement bear a reasonable relation to the "purpose" for confinement. The "nature" of Georgia's mental patients' confinement can only be described through the development and presentation of evidence at the trial court level. There is no factual record in this case since it was decided at the district court level solely on the pleadings.

The two principal appellate decisions supporting the right to treatment, *Donaldson v. O'Connor, supra* and *Wyatt v. Aderholt, supra,* contain voluminous factual records. *Donaldson,* now pending before this Court, contained jury findings of fact, arrived at at the conclusion of extensive testimony before the trial court. *Wyatt,* filed as a class action seeking institution-wide relief, contains thousands of pages of testimony and exhibits.

The instant case is more akin to *Wyatt* than *Donaldson* in that it was filed as a class action seeking injunctive relief for the class confined throughout Georgia's mental health facilities. In order for this court to reach the question posed by Petitioners, a thorough factual record would first have to be developed. The need for such a record can be seen in the very arguments presented herein by Petitioners.

1. For example, Petitioners argue that mere custodial care for some mental patients is constitutionally justifiable (Petition, 20) and that "curative" treatment[5] is not required. It is reasonable to expect that had this case been "tried" before the district court a factual record on that issue would have been developed to show: (A) the number of patients for whom treatment would be totally unsuccessful; (B) the quality of custodial care then provided by the State of Georgia as opposed to that minimally required to maintain a safe and humane environment; (C) the degree to which "hopeless" patients can benefit from active treatment.

2. In like fashion Petitioners argue that a court may not prescribe "a particular dosage of curative treatment." (Petition, 23). Respondents made clear in their complaint that the district court would not be called upon to order a specific treatment plan for each Georgia patient. Rather, the complaint sought class-wide relief to establish minimum standards so that every patient in each institution *could* be treated, regardless of his or her particular needs. The necessity of institution-wide standards, as well as their actual development, depend solely on testimony and other evidence adduced in a judicial proceeding.

3. Additionally Petitioners maintain that the "adequacy" of treatment is not a justiciable issue (Petition, 31-39). Basically Petitioners argue that courts are incapable of defining "treatment" in an enforceable, meaningful fashion. We should note that minimal standards to ensure the delivery of treatment were comprehensively defined by the district court in *Wyatt v. Stickney*. The existence of those standards, as both a procedural and substantive model, refutes Petitioners' contention. But again the

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[5] Of course Respondents do not equate "treatment" with "cure." The goal of treatment programs for the mentally ill is not "cure" them but rather, as the Court of Appeals noted, is to "help each of them to be cured or to improve his or her mental condition." *Wyatt v. Aderhold, supra,* (Pet. App. 32a).

point to be made at this step in the proceedings is that the issue of justiciability cannot be decided in the abstract. Respondents, had the opportunity been provided, could have presented expert witnesses, who, having evaluated the Georgia mental health system, could have given their opinions as to the institution-wide "standards" necessary to insure the delivery of treatment, by whatever mode of therapy.

Petitioners build their argument around abstract quotations, taken out of context, that are meaningless when viewed alone.[6] It is true that dozens of treatment "modalities" or "therapies" exist. Respondents' contention in this litigation is that minimum standards must be established by Petitioners in order to deliver any treatment to Georgia's mental patients. The development of standards to ensure adequate care for Georgia's mentally ill, would not in any way infringe upon the medical judgment of Georgia's professional, mental health staff. The range of treatment alternatives would still be available. The district court would be asked simply to develop minimal standards as to the staff and facilities necessary to provide any type of treatment.

Whether or not Georgia is meeting those minimum standards is not known from the present record. That question can only be answered at the district court level after findings of fact have been made.

4. Petitioners argue that the 11th Amendment prohibits the relief sought by Respondents in the district court. (Petition, pp. 26-30). At the outset it should be noted that no relief has been granted against the State of Georgia, so the argument is at best premature. Further, Petitioners' reliance on the argument shows the need for a factual record. Having no facts to argue Petition-

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[6] The quotation from Dr. Thomas Szasz, Petition at pp. 34-35, for example must be tempered by the understanding of Szasz' basic belief that mental hospitals and treatment for the mentally ill are virtually unnecessary since mental illness is a "normal" condition. See, Szasz, *The Manufacture of Madness* (Harper & Row 1970).

errs in jumping into the Court of Appeals decision in *Wyatt v. Aderholt* and note that Alabama's Governor maintained that implementation of the Wyatt decree would consume 60% of the state's general fund.[7]

It is unlikely that the cost of any court-ordered plan for Georgia's mentally ill would be a defense in light of the Court of Appeals decision in *Wyatt* where it was noted in specific reference to the district court opinion in *Burnham*: "Our holding in *Donaldson*, however, vitiates this argument, of course, for we have now established that the right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment." (Pet. App. 36a). Thus, assuming the correctness of the Court of Appeals' view, the 11th Amendment argument is not a proper defense. However, the question of the appropriateness and permissibility of any remedy would depend upon the facts, in that the facts, as yet undeveloped, would determine the remedy granted by the district court.

Finally, with respect to the "substantial federal question" issue, we should point out that if certiorari is denied in this case, the improtant federal question may never be reached. Respondents, after having had the opportunity to utilize the discovery devices available through the *Federal Rules of Civil Procedure* may well alter the scope of this litigation. Further, Petitioners in their Petition note the existence of a "state" right to treatment. [Petition, p. 9, citing *Ga. Code Ann.* § 88-502.3(a)] If indeed Georgia confers the "right" by statute, Respondents could, upon return to the district court, elect to amend their complaint

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[7] The allegation was unsupported by the record in *Wyatt* and was presented for the first time in brief to the Court of Appeals. To the extent that the *Wyatt* record focused on the question of costs, testimony indicated that implementation of the court-ordered standards would be less costly than the existing system since the court-required discharge and/or transfer of persons inappropriately housed in the Alabama mental institutions, would (and in fact has) radically reduce the institution population.

so as to allege the pendent claim to a right to treatment under the Georgia statute. The case could then be decided on the State claim alone. See, *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

II. The Court of Appeals Was Correct in Reversing the District Court in Light of the Court of Appeals Decision in Donaldson v. O'Connor and Wyatt v. Aderholt.

Upon appeal to the Court of Appeals for the Fifth Circuit the instant case (*Burnham*) was consolidated for purposes of argument and decision with the case of *Wyatt v. Aderholt*. *Burnham* was reversed in a *per curiam* opinion in light of the court's earlier decision in *Donaldson v. O'Connor, supra,* and the contemporaneous opinion in *Wyatt v. Aderholt*.

In seeking to evaluate the correctness of the *Burnham* decision one must necessarily look to the controlling opinions in *Donaldson* and *Wyatt*.

In *Donaldson* the plaintiff filed an action pursuant to 42 U.S.C. § 1983 against two doctors, seeking monetary damages for his claim that during his 14½ year incarceration in a Florida, state-run mental institution he had been unconstitutionally denied treatment. The jury returned a verdict in plaintiff's behalf for a total of $38,500.00. The Fifth Circuit affirmed, holding "that the Fourteenth Amendment guarantees involuntarily civilly committed mental patients a right to treatment." *Donaldson v. O'Connor*, 493 F.2d 507, 510 (5th Cir. 1974), *cert. granted* — U.S. —, 42 L.Ed.2d 138 (October 21, 1974).

The basis of the court's decision is best stated in that court's own language:

> The idea of a constitutional right to treatment has received an unusual amount of scholarly discussion and

> support, and there is now an enormous range of precedent relevant to, although not squarely in point with, the issue. The idea has been current at least since 1960, since the publication in the May 1960 issue of the American Bar Association Journal of Articles by Dr. Marton Birnbaun, a forensic medical doctor now generally credited with being the father of the idea of a right to treatment.
>
> *Donaldson v. O'Connor, supra,* at 520 (citations and footnotes omitted).

With that conceptual introduction the court announced its holding. In explaining its holding the court noted the following factors: (1) civil commitment entails "massive curtailment of liberty," citing *Humphrey v. Cady,* 405 U.S. 504 (1972); (2) governmental abridgement of any freedom must be justified in terms of some "permissible governmental goal," citing Tribe, "Foreword—Toward a Model of Roles in Due Process of Life and Law," 86 *Harv. L. Rev.* 1, 17 (1973); (3) where the rationale for commitment is the *parens patriae* notion that the person committed is in "need of treatment" due process requires that the treatment be in fact provided, citing *Wyatt v. Stickney,* 325 F.Supp. 785 (M.D. Ala. 1971); *Nason v. Supt., Bridgewater Hosp.,* 353 Mass. 604, 233 N.E. 2d 908 (1968), and *Jackson v. Indiana,* 406 U.S. 715 (1972); and (4) where the limitations on the goverment's power to detain (i.e., that detention be in retribution for a specific act, that it be limited to a specific term and that it be imposed after a constitutional proceeding) are absent, there must be a *quid pro quo* extended by the government (i.e., treatment) to justify the detention, citing 5 "lines" of cases omitted here.

Analyzed in the above manner the 5th Circuit's opinion in *Donaldson* is not merely correct, it is to be commended as a model of judicial reasoning and analysis. It should be noted that the *Donaldson* opinion goes on to answer virtually every

point raised here by Petitioners (e.g. justiciability is discussed at 493 F.2d 526).

Finally, with respect to *Donaldson* this court is aware that the case is pending here and awaits decision. If the issue of the right to treatment is reached in *Donaldson* it will of course control the outcome of *Burnham*. Since *Donaldson* is pending here, the Court may elect to defer decision on the instant petition, await its decision in *Donaldson* and then summarily dispose of *Burnham* on the basis of the decision in *Donaldson*. If the Court does not reach the "right to treatment" issue in *Donaldson* then the petition for certiorari in *Burnham* can still be acted upon.

Since it was a "companion" case to *Burnham*, the Court of Appeals decision in *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), is of great significance. In *Wyatt* the Court of Appeals observed that the State of Alabama's major contention (i.e., that the right to treatment was not cognizable under the *United States Constitution*) was "largely foreclosed" by its decision in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974). In reference to *Donaldson* the Court stated:

> We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to self or to others, then treatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of individuals' liberty.

The Court then dealt with each argument presented by Alabama in *Wyatt*. Briefly those arguments are listed below:

1. The State of Alabama argued that the principal justification for commitment of the mentally ill is to relieve the families and friends of the mentally disabled persons from the burden

imposed upon them to care for the persons. The State further argued that, in responding to the "families and friends" needs all the State had to do was provide custodial care for the affected mental patient. The Court of Appeals rejected the argument noting: (A) that the kind of care afforded by Alabama was grossly inadequate and in fact debilitating and (B) that the State's interest as stated was "trivial" when compared to the massive curtailment of the personal liberties of mental patients. *Id.* at 1313.

2. The State of Alabama argued that the relief granted by the district court was barred by the 11th Amendment. The Court of Appeals found the argument inapt since the right protected was one arising under the United States Constitution. *Id.* at 1314.

3. As does Georgia in the instant case, Alabama argued that the right to treatment is not a justiciable issue. The Fifth Circuit reaffirmed its belief, announced in *Donaldson*, that courts "would be able to formulate workable standards" in right to treatment cases. *Id.* at 1314.

4. Alabama argued that the district court opinion in *Wyatt* invaded the province of the state legislature's right to appropriate state funds. Noting that, "That being the case, the State may not fail to provide treatment for budgetary reasons alone," the Court of Appeals rejected the contention. *Id.* at 1315.

5. Finally Alabama suggested that mental patients had adequate remedies at law and that equitable relief was unnecessary. The Court of Appeals found the argument unpersuasive, primarily because the plaintiff-class had sought "preventive relief." Actions such as ***habeas corpus*** and suits for damages could only be brought after treatment had been denied, thus making class-wide injunctive relief appropriate. *Id.* at 1316.

The arguments above are set out at some length because the State of Alabama in *Wyatt* "tracked" the district court opinion in *Burnham*. Additionally many of the contentions in *Wyatt* are made here by the State of Georgia.

CONCLUSION

Since no conflict among circuit courts of appeals exists and since the decision sought to be reviewed was correct the Court should deny certiorari.

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